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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 747

SHAW WAREHOUSE COMPANY, BIRMINGHAM ICE AND COLD STORAGE COMPANY, and BOGGS COLD STORAGE COMPANY,
Petitioners,

vs.

SOUTHERN RAILWAY COMPANY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SOUTHERN RAILWAY COMPANY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States of America.

Petitioners pray that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit to review that Court's decision affirming separate judgments against each of the three Petitioners in United States District Court for the Northern District of Alabama, Southern Division.

OPINIONS BELOW.

The opinion below is reported at 288 F. 2d 759 (R. 1156, Appendix B).[1]. The opinion on rehearing, with the dissent of Judge Brown, is reported at 294 F. 2d 850 (R. 1276, Appendix C).[1] The companion case before the Interstate Commerce Commission, *Shaw Warehouse Co. v. Southern R. Co.*, is reported at 308 I. C. C. 609. The decision of the statutory Three-Judge District Court (N. D. Ala. 1960), affirming the Commission decision *sub nom. Southern R. Co. v. United States*, is reported at 186 F. Supp. 29 (Appendix D). The Pretrial order of the District Court for the Northern District of Alabama, in a suit by the United States under the Elkins Act to require collection of past and future rents at the levels established in the Commission order, and two other related cases, all set for trial on April 23, 1962, is set out in Appendix E.

JURISDICTION.

This Court has jurisdiction under 28 U. S. C. § 1254 (1). The judgment of the Court of Appeals was entered on March 3, 1961 (R. 1196). Rehearing was denied on September 29, 1961 (Brown, J. dissenting) (R. 1297). On December 21, 1961, Mr. Justice Stewart entered an order extending the time for filing a petition for writ of certiorari until February 26, 1962 (R. 1298).

QUESTIONS INVOLVED.

1. Under the Interstate Commerce Act's prohibitions against special rates, rebates, unjust discrimination, concessions, undue preferences, and departures from pub-

[1] Because of numerous statements which Petitioners consider erroneous, the opinion is reprinted in a separate appendix with counsel's notes added in italics.

lished tariffs, can a common carrier by railroad, for the purpose of obtaining freight revenues:

a. Lease non-transportation facilities to shippers at rents which are less than compensatory and less than prevailing market rents for such facilities?

b. Guarantee shipper obligations in order to enable the shippers to obtain long term financing not otherwise available to the shippers?

c. Furnish working capital to shippers by permitting them to occupy railroad-owned facilities for extended periods of time without paying compensatory rents at least equal to prevailing market rents?

2. Is a decision of the Interstate Commerce Commission, affirmed upon judicial review, condemning the rental practices of a railroad as violations of the Commerce Act, binding in appellate court review of rulings by a trial court that the very same practices by the same railroad are, as a matter of law, not violations of the Commerce Act?

STATUTES INVOLVED.

This petition directly involves the following provisions of the Commerce Act as amended: Section 2 [49 U. S. C. § 2] prohibiting special rates, rebates, and similar devices; Section 3 (1) [49 U. S. C. § 3 (1)] prohibiting undue and unreasonable preferences and advantages; Section 6 (7) [49 U. S. C. § 6 (7)] prohibiting departures from tariff rates and prohibiting services or facilities not published in carrier tariffs. These statutory provisions together with Sections 8 and 9 of the Commerce Act [49 U. S. C. §§ 8 and 9], the provisions under which the suits below were filed, are reprinted, in pertinent part, as Appendix A to this Petition.

STATEMENT OF THE CASE.

Petitioners, Shaw Warehouse Company, Birmingham Ice and Cold Storage Company, and Boggs Cold Storage Company, were independent, public warehouse companies located within the railroad reciprocal switching district of Birmingham, Alabama (R. 445). Shaw Warehouse operated a "dry," i. e., non-refrigerated, food and general commercial storage warehouse (R. 248, 262). Birmingham Ice and Cold Storage and Boggs Cold Storage operated cold storage facilities (R. 389, 464). The present proceedings arise from complaints filed by each of Petitioners against Southern seeking damages under Sections 8 and 9 of the Commerce Act for injury to their businesses resulting from the special rebates and favoritism given to competing public dry and cold storage warehouses in Birmingham (R. 79-84, 56-70).

In 1954 Southern Railway began to promote a food and produce terminal development in Birmingham, Alabama, designed to capture for the Southern the rail freight traffic in food and produce in the Birmingham area. The plan involved the location of large shippers and receivers of food and produce at a point on the tracks of the Southern in Birmingham, beyond the reciprocal switching district, which could not be served by any other rail carrier. In order to induce the shippers to locate at the terminal, Southern proposed to make substantial property and financial contributions to the project and to guarantee the repayment of funds borrowed by the shippers to finance the construction of facilities specially and primarily designed for the storage and handling of food products. With this investment of its funds, property, and credit, the Southern expected to create such a concentration of food-handling activities that virtually all food and produce companies would be compelled to move to the new terminal. "Holdouts," according to Southern's Vice Pres-

ident in charge of the terminal promotion, would have to "join the parade or perish"—they would either move to the terminal or "wither on the vine" (R. 883-901).

The terminal facilities, which were to be owned by the shippers through a dummy real estate holding company, were expected to cost over $7,000,000.[2] Of this amount, almost $6,000,000 was to be furnished by Southern's guarantee of low interest first mortgage bonds to be issued by the dummy corporation; over $500,000 was to be contributed by the Southern; the balance was to be provided by a twenty to twenty-five year purchase-money second mortgage from the Southern itself (R. 11-18). The purpose of pledging Southern's credit to guarantee the $6,000,000 loan, according to Southern's Vice President, was to assure that the shippers "did not need any down payment and could do business on a 20 or 25 year basis with a major lender" (R. 1031).

Four competing railroads requested the Interstate Commerce Commission in September 1955 to investigate the activities of the Southern in promoting terminals in a number of cities of the South, including Birmingham. The Commission did not institute the requested investigation. However, the $6,000,000 loan commitment in Birmingham was withdrawn by the major lender because of its doubt as to the validity, under the Commerce Act, of Southern's guarantee of the shippers' obligations (R. 1030-1032). Without Southern's guarantee the shippers were unable to obtain financing for the projected facilities. It therefore became necessary for Southern, in order to create the facilities, to finance all of the construction costs directly. An agreement dated October 18, 1955, was made between Southern and the shippers under which Southern agreed to build, and the shippers to lease, the proposed facilities. The rental agreement further provided that in the event

[2] Actual costs amounted to over $8,000,000 (R. 1035-1036, 117-120, 241, 537).

the original financing plan was, at some unspecified future time, approved by public authority to the satisfaction of the Southern, the parties would revert to that plan[3] (R. 987-991).

The rental agreement provided for a rent based on a flat 8% of all costs except those to be borne directly by Southern under the original plan (R. 983-984, 975-976). Prevailing market rentals in Birmingham for such shipper facilities required an additional charge of at least 2% on the cost of facilities subject to depreciation, such as buildings and equipment (R. 547). It was undisputed that Southern did not charge this additional rent on the cost of buildings and equipment because the purchase provision of the agreement provided for a purchase at undepreciated original cost and the rents paid in the meantime would not be applied to the purchase price (R. 689-690).

The facilities were constructed by the Southern for shipper occupancy under this rental agreement in 1955-1956. Included were two large warehouse facilities: one, for cold storage, built for Birmingham Terminal Cold Storage Company; the other, for both cold and dry storage, built for Thomas N. Nelson & Company. These two facilities cost $2,400,000, exclusive of the value of land (R. 125-126), and were occupied in the summer of 1956 (R. 1005-1006). Neither of these shippers made any rent payment to Southern until May 1957, almost a year after the facilities were first occupied (R. 1024-1025). Nelson Company then "paid" 6 months rent by giving Southern

[3] Nothing in the October, 1955 agreement compelled or suggested that the Southern or its tenant shippers would take any action to obtain the approval of public authority. In fact, the only formal action ever initiated before the Commission concerning this agreement was the complaint filed by Shaw Warehouse Company with the Interstate Commerce Commission in July, 1957, which resulted in the decision of the Commission ordering the Southern to cease and desist from its program of rental favoritism. 308 I.C.C. 609.

a note, which was never paid (R. 1088). Nelson Company in fact paid only 2 months rent during the 26 months of occupancy of these facilities (R. 1102-1103). Terminal wholly failed to pay its last 8 months rent, and paid the remainder from 3 to 9 months in arrears (R. 24-26, 352-355). The combined unpaid rental arrearages of these two competitor warehouse companies, at the time of the trial, amounted to over $250,000 (R. 25, 1103). These warehouse companies used the funds, which otherwise would have been required to pay rents, to finance low storage rates and free services to warehouse accounts as a means of attracting business to the new terminal (R. 183, 261, 402, 1113). Both operated consistently at such great business losses that neither could ever pay the rent owed at any time during their occupancy from storage revenues; neither had sufficient capital to pay otherwise (R. 24-26, 356-358, 1100-1101).

Shaw Warehouse Company, in July 1957, filed with the Interstate Commerce Commission a formal complaint against the Southern under Section 13 of the Interstate Commerce Act. The complaint sought a declaration of the legality of Southern's practices at the terminal in Birmingham and a cease and desist order to prevent continued injury to the business of Shaw Warehouse Company as a consequence of Southern's practices (R. 87-92). These Commerce Act actions by Petitioners to recover damages to their businesses resulting from Southern's activities were filed in April and June 1958, in time to forestall the effect of the two-year statute of limitations provided for in Section 16 (b) (3) of the Interstate Commerce Act [49 U. S. C. § 16 (b) (3)]. The damage actions were reached for trial by the District Court in May 1959 (R. 104), almost six months before the Commission made its final determination on the complaint filed by Shaw, 308 I. C. C. 609. The District Court by pre-trial order directed that the three damage actions be consolidated for trial to this ex-

tent: The issue of Southern's liability was to be tried first in a joint jury trial; thereafter, if necessary, the damage issue would be submitted to the same jury in three separate trials, one for each Petitioner (R. 102).

At the trial on liability, undisputed evidence of the facts outlined above with respect to Southern's admitted freight procuring purpose, the original plan with its railroad-guaranteed financing, the rental agreement, Southern's rental computations, the prevailing market practice of including depreciation in rents, and the failure to collect rents from Petitioners' competitors, was produced before the jury. At the conclusion of the evidence, the issue of Southern's liability under the Commerce Act was submitted to the jury by the trial court with the following instructions of law:

1. There was nothing wrong with the guarantee by the Southern of the shippers' mortgage obligations provided in the original sales plan (R. 796).

2. Ordinarily a railroad is required to charge rents equal to fair market rents or compensatory rents, whichever is higher, but that, if the jury believed that Southern and the shippers intended to go through with the original sales plan, Southern could, in fixing rents, ignore the element of depreciation normally included in calculating either market or compensatory rentals (R. 793-794, 798, 800, 806, 825).

3. The only duty of a railroad in collecting rentals was to exercise due diligence under all the circumstances which the jury felt bore on that issue (R. 791, 799, 824).

Petitioners' exceptions to those instructions were overruled (R. 807-822, 827-829). The jury returned a verdict for Southern against Petitioners, upon which separate judgments were entered. After a motion for new trial had

been overruled (R. 833-866, 867). Appeals were taken to the Court of Appeals for the Fifth Circuit (R. 868-871).

In October 1959, over four months after the judgments were entered in the District Court, the Interstate Commerce Commission declared that Southern's rental charges and collection practices violated the Commerce Act, and ordered Southern to cease and desist from such practices. The Commission ordered the Southern to charge and collect rentals equal to not less than Birmingham market rentals, which the Commission found to be 8% on the value of the land and 10% on the cost of all improvements. *Shaw Warehouse Co. v. Southern R. Co.*, 308 I. C. C. 629, 636-637. Southern applied for a statutory three-judge court review of the Commission's order except with respect to its rental collection requirements. On July 18, 1960, in *Southern R. Co. v. United States*, 186 F. Supp. 29 (N. D. Ala. 1960), the Three-Judge Court (composed of Circuit Judges Rives and Tuttle and District Judge Lynne) affirmed the Commission's order. The Three-Judge Court held, *inter alia*, that: (a) The original sales plan necessarily involved an unlawful extension of railroad credit through the guarantee of loans to the shippers; and (b) Southern was required, in order to comply with the provisions of the Act, to charge and collect the higher of either compensatory rent or fair market rents. 186 F. Supp. at 37, Appendix D. And the Three-Judge Court expressly rejected Southern's argument that the amount of compensatory or market rental could be reduced by ignoring the element of depreciation because of an intention to revert to the sales plan at some future time. 186 F. Supp. at 38, Appendix D. The Southern did not appeal this judgment of the Three-Judge Court to this Court, as it had a statutory right to do under 28 U. S. C. § 1253.

The decision and order of the Commission in this companion administrative proceeding had been rendered and

affirmed by the Three-Judge Court prior to the initial decision on appeal by the court below. The court below, composed of Circuit Judges Hutcheson, Brown and Wisdom, affirmed the judgments (R. 1196, Appendix B), holding that the instructions to the jury challenged by Petitioners were entirely correct.[4] Petitioners sought rehearing, and rehearing *en banc*, in the Court of Appeals to reconcile the serious conflict on important legal issues under the Commerce Act between the decision of the Court of Appeals on the one hand and those of the Commission and of the Three-Judge Court on the other (R. 1201-1251). The petition was denied, with the majority of the Court of Appeals concluding that, while it had given "great weight" to the opinions of the Commission and the statutory three-judge court, "Still we must decide this case on the record before us and in the light of the law as we read it" 294 F. 2d at 852 (R. 1277). Judge Brown vigorously dissented from the refusal, on rehearing, to reverse the judgments of the District Court, 294 F. 2d at 853-859 (Appendix C).

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[4] The court below also suggests that, even if the jury charges were wrong on these issues, any error in the charge with respect to liability was cured because the jury might have decided, even though petitioners had been prohibited by the pre-trial order from proving the extent of their damages, that the Petitioners had actually suffered no injury capable of expression in dollars and cents. (See R. 783). If this should be construed as an independent ground of decision, this petition should be construed as presenting a third "question presented". Should an appellate court affirm a judgment, in a separate trial on the issue of liability, on the basis of a failure to prove damages in dollars and cents? Such a holding would violate Petitioners' right to a jury trial under the Seventh Amendment—it would constitute a holding that a jury trial in which a full trial of the issue of damages was not permitted, could be upheld for a failure of proof on that very issue. This would be contrary to cases such as *Smyth Sales v. Petroleum Heat and Power Co.*, 141 F. 2d 41 (3rd Cir. 1944), which hold that the Seventh Amendment right of jury trial extends to the issue of damages. See notes 3 and 5 to dissent of Judge Brown on rehearing, Appendix C, 294 F. 2d at 854.

REASONS FOR GRANTING THE WRIT.

A. Conflicts With Credit Extension Cases.

One of the freight buying schemes sometimes employed by railroads is the rental of facilities to favored shippers at less than cost or less than prevailing prices. Another is extension of credit to shippers so that such shippers are, in effect, permitted to employ as working capital the very life blood of every business engaged in the sale of goods or services—moneys currently owed to the railroad. The costs or losses incurred by reason of such reduced rents and credit extensions are written off by the railroad against freight revenues. The result is that the railroad receives, and the shipper pays, less than the railroad's published tariff charges of nonfavored shippers.

All of these devices have been uniformly condemned by this Court, by lower courts, and by the Interstate Commerce Commission under both the Commerce Act and its supplementary statute, the Elkins Act (49 U. S. C. [ ] 41 et seq.). As the Three-Judge Court stated, after reviewing

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(a) See Non-collection or delayed collection of amounts owed for credit: *United States v. Hocking Valley R. Co.*, 194 Fed. 234 (S. D. Ohio 1911), affirmed 216 Fed. 735 (6th Cir. 1914), cert. den. 234 U. S. 757 (1914); *United States v. Sunday Creek Co.*, 194 Fed. 252 (S. D. Ohio 1911), affirmed 210 Fed. 747 (6th Cir. 1914), cert. den. 234 U. S. 757 (1914); *Landalia R. Co. v. United States*, 226 Fed. 713 (7th Cir. 1915), cert. den. 239 U. S. 642 (1915); *Propriety of Operating Practices—New York Warehousing*, 198 I. C. C. 134 (1933), superseded by 216 I. C. C. 291, 305-306 (1936), affirmed 220 I. C. C. 102 (1937), sustained *Baltimore & Ohio R. Co. v. United States*, 20 F. Supp. 273 (D. Md. 1938), affirmed 305 U. S. 507 (1939), reaffirmed 241 I. C. C. 500 (1940), *Union Pacific R. Co. v. United States*, 313 U. S. 450 (1941), affirming 32 F. Supp. 917 (W. D. Mo. 1940); *Practices of Carriers—Packing Sheds*, 246 I. C. C. 273, 286 (1941).

(b) Lease of facilities at less than cost or prevailing market rentals: *Cleveland, C. C. & St. L. R. Co. v. Hirsch*, 204 Fed. 849,

this consistent line of rental device cases, in *Southern R. Co. v. United States, supra*:

> "Emerging from these cases is the clear rule that rents railroads charge for facilities leased for the purpose of attracting freight must be no less than the prevailing market rents in the area, and no less than compensatory, including the normal return on capital employed in like enterprises, whichever is higher. A carrier is prohibited from engaging in such noncarrier business because it can offset any losses against carrier revenues. It cannot operate noncarrier business as a means of securing freight business free of the Commerce Act's required standards for carrier conduct." 191 F. Supp. at 17.

The rental devices employed by Southern in Birmingham were complex and devious, as shown by this petition and by the opinions below. However, if this Court will examine but three aspects of Southern's activities, the serious nature of the questions presented here will be apparent:

(1) Rentals charged were both less than compensatory and less than prevailing market rents because they failed to take into account the depreciation cost of furnishing the facilities.

(2) Depreciation costs were eliminated from rents by Southern on the theory that financially defunct

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352 853 (6th Cir. 1913); *Central of Georgia R. Co. v. Blount*, 238 Fed. 202 (5th Cir. 1917); *Leases & Grants by Carriers to Shippers*, 73 I. C. C. 671, 683 (1922); *Baltimore & Ohio R. Co. v. United States, supra*; *Union Pacific R. Co. v. United States, supra*.

(c) See also the following cases treating the absorption of construction costs and land acquisition costs: *United States v. Stock Yard & T. Co.*, 226 U. S. 286 (1912), reversing in part 192 Fed. 330 (Com. Ct. 1912); *United States v. General Motors Corp.*, 226 F. 2d 745, 748-749 (3rd Cir. 1955).

corporations intended to purchase the facilities in the future at full original cost, if the purchase money could be borrowed on the basis of the seller railroad's credit.

(3) Even the rents which excluded depreciation were not collected.

1. *Depreciation Costs Excluded From Rent*—Southern Railway purported to charge rents computed on the basis of 8% of all costs. Prevailing Birmingham rental practices necessitated a rent equal to at least 8% of the cost of land, and, in order to take depreciation cost into account, at least 10% of the cost of depreciable improvements such as buildings, machinery, and special equipment. Applied to the $2,000,000 of warehouse facilities Southern furnished Nelson Company and Terminal Cold Storage (R. 128-130), Southern's elimination of the 2% depreciation factor meant a rental reduction of $40,000 per year or $3,000 per month—no insignificant addition to working capital for a small businessman.

Both the opinion below (238 F. 2d at 771) and the jury charge (R. 703-704, 708, 801, 804-806) recognize that depreciation cost must normally be recovered in the rentals a railroad charges to a shipper. However, an exception was created by the courts below on the theory that if there is to be a future sale of the facilities at original cost, depreciation costs will be recovered at the time of such sale. Under these conditions the court below held, and the jury was instructed, that Southern need not charge

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8 Neither Nelson Company nor Terminal Cold Storage was even in business at the time of trial (R. 359, 630-641, 655-656). Both the remaining tenants and Southern, in an Elkins Act proceeding by the United States, seek to avoid payment of back rents at the levels set in the Commission order, and at the same time now maintain a right to purchase at present, or depreciated, value. See Pretrial Order (Civil Actions 9155, 9080, 9815, N. D. Ala.), Appendix E.

market or compensatory rentals. This same legal proposition was advanced by Southern in its effort to overturn the Commission order requiring Southern to include in its rent 10% of all construction costs for depreciable facilities. The Three-Judge Court flatly rejected Southern's proposition, holding:

> "Southern insists that in fixing its rental charges it was not required to take into account depreciation costs because, it contends, the tenants are obligated by the October, 1955, lease agreement to purchase the facilities at undepreciated cost. If this were true, and if the landlord was not a railroad leasing freight facility, there would be some logic in this position since its 8 percent rent would treat all of the costs as not being subject to depreciation in the same manner as the prevailing market rental formula treats land. However, such a rental formula would be the equivalent of an agreement by the railroad to postpone part of the rent to a future date, resulting in an unlawful loan or extension of credit similar to the extension of credit on delayed rent collections condemned by the Commission" (186 F. Supp. at 38).

The court below rejected the holding of the Three-Judge Court. Its rejection brought the opinion below into direct conflict with the decisions of at least two other Circuit Courts of Appeal, those for the Sixth and Seventh Circuits.

The Sixth Circuit condemned railroad extensions of credit to shippers in *Hocking Valley R. Co. v. United States*, 210 Fed. 735 (6th Cir. 1914), affirming 194 Fed. 234 (N. D. Ohio, 1911), cert. den. 234 U. S. 757 (1914). There the railroad followed a pattern of extending credit on freight bills, a practice which the District Court had said must strike "anyone of fair intelligence" as a method of granting shippers a substantial advantage over their com-

petitors by giving the shipper "the privilege to do business upon the capital of the carrier." 194 Fed. at 251. The Court of Appeals agreed that any such extension of credit to a shipper violated Section 6 (7) of the Commerce Act because it was "equivalent to providing for him working capital." 210 Fed. at 740.

In *Vandalia R. Co. v. United States*, 226 Fed. 713 (7th Cir. 1915), *cert. den.* 239 U. S. 642 (1915), the Seventh Circuit condemned loans to shippers. A railroad had loaned money to a shipper at an interest rate which was two percentage points below prevailing market interest, just as Southern charged rent based on a percentage of costs which was two percentage points below prevailing market rentals. The Court correctly held that the result was indistinguishable from those cases which condemned the charging of less than market rents to shipper tenants, *Cleveland C. C. & St. L. R. Co. v. Hirsch*, 204 Fed. 849, 852, 853 (6th Cir. 1913); *see also Central of Georgia R. Co. v. Blount*, 238 Fed. 202 (5th Cir. 1917). The Seventh reasoned that "a loan at less than the market rate of interest, like a lease at less than market value . . . is a gift of the difference," and as such constitutes a rebate, 226 Fed. at 717.

The Three-Judge Court held that Southern's exclusion of depreciation was controlled by these principles; the postponement of depreciation until a future purchase was in effect a loan at zero interest—and with no security for payment other than a promise to purchase if, and only if, the railroad itself could, under the Act, endorse the shippers' mortgage notes. Neither Nelson Company nor Terminal Cold Storage will ever repay that loan.

2. The Mortgage Loan Guaranteed by Southern—The holding of the Court below with respect to Southern's agreement to guarantee the mortgage obligation of the

shippers is obscured by the opinion below. At first reading it may appear that the opinion of the Court of Appeals holds that the legal propriety of the guarantee under the Commerce Act was a jury question which had been properly submitted to the jury for decision. 288 F. 2d at 773. The record shows, however, that the lawfulness of such a guarantee was not left to the decision of the jury. The trial judge treated the matter as an issue of law and, as such, instructed the jury that the guarantee by the Southern was lawful. The trial court's instruction was:

> "There was nothing wrong with guaranteeing a loan on the part of the Southern if the property was being sold for its fair value or cost to the railroad, there is nothing wrong with that" (R. 796; see 814-815).[7]

The Commerce Act prohibits such a guarantee because it represents still another way to grant a shipper an advantage at the railroad's expense. Any loss sustained by reason of such a guarantee must be borne by the carrier and offset against freight revenues. In practical effect the result is no different from that produced by a direct loan to the shipper since, by using the railroad's credit position, the shipper's available working capital need not be diverted to capital expenditures and its available cash is thus increased. This was clearly recognized by the Three-Judge Court when it held:

> "This financing plan with its otherwise unsecured second mortgage, and its first mortgage which is fortified by additional security of Southern's full guarantee of the obligations of each tenant, is merely a more complex form of credit extension such as those

[7] The opinion must be construed as approving this charge, both directly, 288 F. 2d at 762, and indirectly by its approval of the depreciation elimination proposition rejected by the three-judge court, 288 F. 2d at 772.

condemned in Vandalia R. Co., supra, Hocking Valley R. Co., supra; and, Propriety of Operating Practices—New York Warehousing, supra." (186 F. Supp. at 38).

And when the Court below rejected the holding of the Three-Judge Court, it again put its opinion in direct conflict with the Sixth and Seventh Circuit holdings in the *Vandalia* and *Hocking Valley* cases relied on by that court.

3. *Failure to Collect Rents*—The Commerce Act "condemns the means by condemning the end." *Hocking Valley R. Co. v. United States, supra*, 194 Fed. at 252. The courts below would measure Southern's rent collection practice by Southern's intentions, rather than by the resulting advantage enjoyed by the non-rent-paying tenants. It permits approval of the means without regard to this end product.

The fact is that, at best, Southern's rents for Petitioners' competitors excluded, as Petitioners have demonstrated, over $48,000 per year in depreciation costs. Even if measured by Southern's own no-depreciation rents, over $250,000 of rent owed the railroad was used by the tenant-shippers to finance their efforts to destroy Petitioners' business and move more freight traffic to Southern's terminal. And Southern's overriding freight motivation was not only admitted (R. 163), it was shown by Southern's own records: on the same day, Terminal Cold Storage was given a further rent extension because it had produced 216 carloads of freight; another tenant which had produced no freight was ordered evicted (R. 1040-1041). The practice of extending credit on rents was a freight-buying *means* which produced the very unlawful *end* which was condemned in the *Vandalia* and *Hocking Valley* cases. See 288 F. 2d at 774-775. Yet the courts below hold that Southern's rent collection delays

and failures were legally proper if the jury was satisfied that Southern had exercised due diligence, under the circumstances, in an effort to make collections.

The Court of Appeals appears to uphold this "due diligence" charge on the basis of an interpretation of the Section 3 (1) prohibition of "undue and unreasonable" preferences. But the charge measures the nature of the preference by Southern's "good intentions," rather than by the resulting advantages enjoyed by the shipper tenant; the charge ignores altogether Sections 2 and 6 (7). 288 F. 2d 774. Under Section 2 a carrier granting "any special rate, rebate, drawback, or other device," by which the carrier receives less from one shipper for a service than it receives from another, is by such conduct itself "deemed guilty of unjust discrimination." Section 6 (7) declares unlawful any deviation from tariff charges, and any extension of privileges or facilities not provided for by a published tariff. The "due diligence" charge constitutes a near revolutionary approach to Commerce Act construction. As Mr. Justice Holmes stated in *Lehigh Valley R. Co. v. United States*, 243 U. S. 445, 446 (1917), an allowance made to a shipper in order to secure freight traffic "however honest and however justifiable on commercial principles, would be contrary to the Act to Regulate Commerce." And in its most recent *railroad* rental practice case, *Union Pacific R. Co. v. United States*, 313 U. S. 450, 462 (1941), this Court stated, "Violation of the commerce acts through receipt of advantages is to be tested by actual results not by intention." By approving the "due diligence" test the Court below wholly disregarded these decisions.

No such rule has been applied by the regulatory body charged with the day to day administration of the Act. In *Propriety of Operating Practices—New York Warehousing*, 216 I. C. C. 291 (1936), a decision ultimately af-

firmed by this Court in *Baltimore & Ohio R. Co. v. United States*, 305 U. S. 507 (1939), the Commission stated:

> Obviously no independent warehouse could continue to sublease space or store goods at charges below cost. From January 1931 through March 1934, in no instance did the warehouse company make its monthly rental payments when due, the periods allowed to elapse ranging from 1 month and 25 days to 8 months. No payments had been made from April to October, 1934 . . . . If the warehouse company were an independent corporation competing with other warehouses it would clearly be unlawful for the Lackawanna to subsidize or grant concessions to it through the noncollection of rentals or leasing of space at noncompensatory rates or by similar means to bear a portion of the cost of its operation. (216 I. C. C. at 305-306.)

Under Commission decisions, a railroad has a positive duty to avoid circumstances which enable tenants to exact such concessions. In *Practices of Carriers—Packing Sheds*, 246 I. C. C. 273, 286 (1941), it was declared that when new facilities are constructed for shippers, a carrier must not only charge a rental "which will fully cover a fair return on value, plus taxes, insurance, depreciation and maintenance," but that a carrier should not construct such facilities at all "*unless there is assurance, with all reasonable certainty, that such rentals can and will be collected.*" See *Southern R. Co. v. United States*, *supra*, 186 F. Supp. at 37.

B. Conflicts With Primary Jurisdiction Cases.

This petition also presents important questions under the doctrine of "primary jurisdiction". If the credit extension issues concerning the depreciation exclusion, the mortgage bond guarantee, and the failure to collect rents

do involve questions of reasonableness, as held by the court below, they called for the type of quasi-legislative or expert administrative determination discussed by the Court in *Mitchell Coal & L. Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 257-258 (1913). In such circumstances the Interstate Commerce Commission decision in *Shaw Warehouse Co. v. Southern R. Co., supra*, having been affirmed in *Southern R. Co. v. United States, supra*, would be binding upon Southern and all other persons affected, including especially the parties below. If these issues called for expert Commission judgment, the Commission's ruling should certainly have been followed by the Court of Appeals under *United States v. Western Pacific R. Co.*, 352 U. S. 59 (1956), as insisted by Judge Brown in his dissent. Such cases as *A. J. Phillips v. Grand Trunk W. R. Co.*, 236 U. S. 662, 665 (1915) and *National Pole Co. v. Chicago & N. W. R. Co.*, 211 Fed. 65 (7th Cir. 1914),[8] clearly hold that such Commission determinations are binding on all persons similarly situated, and on the courts, without regard to the applicability of *res judicata* or collateral estoppel.[9] Thus, if questions of reasonableness were involved in the decision below, the opinion is in conflict with basic decisions of this Court and with a decision of another circuit when it refuses to follow the Commission decision, as affirmed by the Three-Judge Court.

If, on the other hand, the trial court should have charged the jury that a failure to charge and actually collect the

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[8] Cf. Terminal Warehouse Co. v. Pennsylvania R. Co., 297 U. S. 500, 508 (1936).

[9] We submit that the fact that the damage suits here would not be *res judicata* against the United States and other parties in *Southern R. Co. v. United States, supra*, 186 F. Supp. at 41, does not prevent the application of doctrine in the *Shaw* or *Birmingham Ice* cases where every party was also a party before both the Commission and the Three-Judge Court, and where the same issues of rental amount, mortgage guarantee, depreciation elimination, and rental collections were clearly finally adjudicated between such parties.

higher of compensatory or prevailing market rents would, if proved, constitute a per se violation of the Commerce Act, as would any rebate or any other clear departure from published tariffs, the doctrine of primary jurisdiction would have no application. *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 196-197 (1913). Petitioners would at least be entitled to a new trial because the trial court certainly submitted the issues in the case to the jury as if the legality of Southern's practices depended on a question of the reasonableness. Whether or not the issues below are such as to call into play the doctrine of primary jurisdiction, the opinion below decides important issues under the Interstate Commerce Act in a manner which is inconsistent with the prior decisions of this Court as demonstrated above.

C. Collateral Attack on the Commission Order.

The concession prohibitions of the Commerce Act with which these cases are concerned stand at the heart of the entire regulatory program of the Act. Rate regulation means little if persons in the position of Petitioners can be so easily deprived of its complete protection. Commission decisions on such practices are reduced to much ado about nothing if, even after final review, they can be collaterally overruled with respect to very persons most directly affected. Judge Brown described the opinion's effect in this manner:

> "It disregards altogether the right to recover damages as a sanction in the effectuation of an important congressional policy forbidding any and all kinds and types of discriminatory practices. Such a result frustrates the effectual enforcement of that policy. It leaves the body charged with responsibility of a continuing policing of that grand scheme with the power merely to make pious but academic declarations. True,

a cease and desist order could be entered but as these two proceedings demonstrate, that is thought to be a matter of little importance to the railroad. By practices condemned outright by the ICC and which it may no longer carry on, it has built a terminal which unlawfully favors the tenants. The deed is done" (294 F. 2d at 858, Appendix C).

Southern had already had one court review of the legal theories approved below. In the first review those theories were finally adjudicated and rejected by the Three-Judge Court. The court below treats that adjudication as a matter of no concern and places on the record a later decision which commends and approves the very same legal propositions so recently rejected. Southern is forbidden to continue its practices under one authoritative interpretation of the Commerce Act; Petitioners have been denied compensation for the destruction of, or severe damage to, their businesses on another diametrically opposite interpretation of the very same statutory provisions.

The theory of decision employed by the Court of Appeals, if generally followed, will convert every effort of an injured party to enforce his clear statutory right under Sections 8 and 9 into an opportunity for the offending railroad to mount an otherwise unavailable collateral attack on Interstate Commerce Commission decisions. Such disruption of the statutory scheme of regulation should not be invited by this Court. See note 15 to the dissent on rehearing by Judge Brown, 294 F. 2d at 859, Appendix C. It is impossible to conceive of the reverse of the situation below. If the Petitioners had succeeded below, and the Commission had then found the practices perfectly proper under the Commerce Act, the Commission decision almost certainly should, and probably would, prevail over such a damage judgment. Petitioners submit that the opinion below threatens an important and active field of regulation

in a manner which surely calls for this Court to seriously consider the need for exercising its supervisory powers, by granting the writ prayed for herein.

CONCLUSION

As demonstrated, this petition presents questions of continuing importance under the Interstate Commerce Act which have been decided in a manner which conflicts with prior decisions of this Court and of other Circuit Courts of Appeal and which should be authoritatively settled by this Court.

Petitioners therefore respectfully submit that for the reasons set out in this petition the writ of certiorari should be granted as prayed herein.

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APPENDICES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 19

No. 747

SHAW WAREHOUSE COMPANY, BIRMINGHAM ICE AND COLD STORAGE COMPANY, and BOGGS COLD STORAGE COMPANY,
Petitioners,

vs.

SOUTHERN RAILWAY COMPANY, et al.,
Respondents.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FIFTH CIRCUIT.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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APPENDIX A.

STATUTES RELIED ON.

Section 2 of the Interstate Commerce Act (49 U.S.C., § 2):

> If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property . . . subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation . . . of a like kind of traffic . . . under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

Section 3(1) of the Interstate Commerce Act (49 U.S.C., § 3 (1)):

> It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular persons, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .

Section 6(7) of the Interstate Commerce Act (49 U.S.C., § 6 (7)):

> . . . nor shall any carrier charge or demand or collect or receive a greater or less or different com-

pensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Section 8 of the Interstate Commerce Act (49 U.S.C., 8):

> That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 9 of the Interstate Commerce Act (49 U.S.C., 9):

> Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter . . . may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; . . .

APPENDIX B.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SHAW WAREHOUSE COMPANY, BIRMINGHAM ICE AND COLD STORAGE COMPANY, and BOGGS COLD STORAGE COMPANY,

versus

SOUTHERN RAILWAY COMPANY, ET AL.,

No. 18138

United States Court of Appeals,

Fifth Circuit.

(March 3, 1961.)

288 F. 2d 759.

[761] Before Hutcheson, Brown and Wisdom, Circuit Judges.*

Wisdom, Circuit Judge: Shaw Warehouse Company, Birmingham Ice and Cold Storage Company, and Boggs Cold Storage Company sued the Southern Railway Corporation and two of its subsidiaries—The Alabama Great Southern Railway Company and The Georgia Industrial Realty Company[1]—under Sections 8 and 9 of the Interstate Commerce Act.[2] 49 USCA, §8 and §9. The

[1] Georgia Industrial Realty Company is a wholly-owned real estate holding company that acts as the land department of the Southern. It is a defendant only in the action brought by Birmingham Ice.

[2] Section 8 of the Interstate Commerce Act (49 U.S.C. §8) reads: "That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any

* [*Counsels' notes—Counsels' footnotes printed in italics have been added, using letter designations.*]

complaint alleges that the defendants violated Sections 2, 3(1), and 6(7) of the Act.[3] 49 USCA, §§2, 3(1), 6(7). These sections prohibit a railroad from giving "any undue or unreasonable" concession, such as a preference or rebate, or from departing from published tariffs.[4]

The case is unusual.[5] The plaintiffs are not shippers or receivers of freight. They do not purport to render transportation services. Shaw Warehouse is served by

act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Section 9 of the Interstate Commerce Act (49 U.S.C. §9) reads: "Any person or persons, claiming to be damaged by any common carrier subject to the provisions of this chapter . . . may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; . . ."

[3] Shaw and Boggs allege also a violation of Section 20(a) of the Act. We find it unnecessary to discuss this section, since we consider it clearly inapplicable.

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[4] *Section 2 provides that carriers employing "special rates, rebates, drawbacks, or other devices" by which some persons are charged a greater or lesser compensation for transportation services "shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful." Section 6(7), as noted by the opinion, requires strict adherence to tariffs and prohibits the extension of any privileges or facilities in the transportation of passengers or property, except as are specified in such tariffs. See Court's note 11, infra.*

[5] *See* Southern Railway Co. v. United States, 186 Fed. Supp. 26, 36 (N. D. Ala. 1960), *where the Court stated, "The railroad rental practices condemned by the Commission are not novel. They are but variations of practices which have been uniformly condemned by the Commission and the courts under both the Interstate Commerce Act and its cognate statute, The Elkins Act, 49 U.S.C.A. §§ 41-43, which, for such purposes have been considered to be pari materia."*

Southern but the other plaintiffs have no direct relationship with the carrier. The plaintiffs are public warehouse companies in Birmingham, Alabama. Each claims damages for business losses attributable to discriminatory rental practices in Southern's operation of a terminal, the Birmingham Food Terminal Corporation. The Act goes back almost seventy five years. 24 Stat. 379 (1887). In a number of cases, Courts[4] and the Interstate Commerce Commission have held that a railroad's rental practices in operating a terminal may violate the Act,[5] but we have

[4] See, for example, Baltimore & Ohio R.R. v. United States, 1939, 305 U.S. 507, 59 S.Ct. 284, 83 L.Ed. 318, affirming 20 F.Supp. 372, (1937), in which the Court indicated that warehousemen suffered severe damages.

[5] In a proceeding before the Interstate Commerce Commission instituted by Shaw Warehouse Company, in which Birmingham Ice & Cold Storage intervened, the Commission issued an order requiring Southern to cease and desist from the same practices complained of here. Warehouse Co. v. Southern Railway Company, et al. 308 I.C.C. 689 (1959). Southern sued to enjoin and set aside the Commission's order. A three-judge court upheld the report and order of the Commission. Southern Railway Company, et al. v. United States, N.D. Ala., 1960, 180 F.Supp. 20. On the request of counsel for the parties, Judge Seybourn H. Lynne, the trial judge in the private litigation, did not recuse himself. Judge Lynne was the organ of the three-judge court.

Appellants assert that the Commission decision is authoritative and that failure of this Court to decide in their favor will produce "paradoxical results". But the thrust of this private litigation and the thrust of I.C.C. proceedings in the interest of the public are different; the issues of causation and injury present in this case were not present in the I.C.C. proceedings.[6] The records are dif-

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[6] *Boggs Cold Storage also intervened, but it subsequently was forced out of business and it could no longer benefit from a cease and desist order. Shaw Warehouse Co. v. Southern R. Co., 308 I.C.C. 689, n. 3 at 694.*

[7] *The cases below were consolidated for a separate trial on the issue of liability only, i.e., whether Southern violated the Commerce Act. Petitioners were prohibited from proving their damages, but were required by the trial judge to present a prima facie case of injury (R. 167). On appeal Petitioners complained of the Court's charge to the jury, in such a trial, that the verdict should*

been able to [762] find only one case in which a warehouseman sued a carrier for damages based on discriminatory rental practices.[6]

The complaint alleges that the Terminal leased warehouse facilities to the plaintiffs' competitors at rentals lower than the prevailing rentals for such facilities in Birmingham and did not require the tenants to make timely payments of rent. Such concessions would reduce the tenants' need for working capital. As a result of this unlawful advantage, the plaintiffs say, their competitors at the Terminal were able to cut rates and offer atractive inducements to customers—causing the plaintiffs to lose some of their storage accounts and to make costly rate reductions to keep other accounts. Southern, so the argument runs, expected to offset losses from concessions with increased freight revenues.

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ferent: there was considerable evidence before the jury that was not before the Commission. The jury may have found that Southern violated the Act, but that the violations caused no injury to the defendants." There is no necessary inconsistency, therefore, between the jury's finding and the Commission's finding.

The appellants had the right to seek damages before the Commission or before the district court. They chose the district court. They failed in that forum. We are unimpressed with the argument that we should reverse the verdict in the forum below on the strength of a finding in another forum. The opinions of the Commission and of the three-judge court are valuable on the questions of law pertinent to this appeal, and to that extent are entitled to weight. With deference to the Commission and to the three-judge court, this Court still must decide the appeal on the record before us and in the light of the law as we read it.

[6] Pittwood v. Northern Pacific Railway, 51 I.C.C. 635 (1918); order approved in Fireproof Storage Co. v. Hines, E.D. Wash., 1919, 261 Fed. 215.

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be for the defendant unless the Petitioners had gone further and proved "an injury or damage which is capable of being transplanted into dollars and cents" (R. 783); the trial court itself, by submission of the case to the jury, had ruled that a prima facie case of injury had been shown. See note 5 to dissent of Judge Brown, infra, 294 F. 2d at 854.

" See Counsels' Footnote d, supra.

Southern denies that it made any undue concessions, asserts that there was no discrimination in relation to transportation (prerequisite to the plaintiffs' recovery under the Act), and insists that in any event there was no causal connection between its actions and the alleged injury, if any, to the plaintiffs.[7] Southern argues that the plaintiffs seek to protect an entrenched warehousing position at the expense of consumers and the food distribution industry in the Birmingham area.

The district court consolidated the three suits for trial before a jury on the sole issue of the defendants' liability. The court narrowed the major factual issues to two: (1) "Was the rent charged to the tenants of the Birmingham Food Terminal a fair rental, in view of all the circumstances, a fair market rental, or was it less than the fair market rental, or was it less than a compensatory rental?" (2) "[If] you decide that it was a fair market rental and that it was a compensatory rental, then there would be a second question because the plaintiff is saying in each case that if it is conceded that the rental was a fair market rental or a compensatory rental, the railroad was guilty of unlawfully extending its credit to the tenants by failing to use due diligence in collecting the rent." The jury returned verdicts for the defendants.

[7] At the conclusion of the evidence, both the plaintiffs and the defendants moved for directed verdicts. The trial judge denied the motions. After the jury returned verdicts for the defendants, the plaintiffs moved for judgments notwithstanding the verdicts, or, in the alternative, for new trials. The motions were denied. The actions were consolidated for appeal.

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[8] *This Court stated in* Union Pacific R. Co. v. United States, 313 U.S. 450, 467 (1941):

> "... *it is the result and not the purpose which determines the illegal character of advantages granted shippers, when there is a purpose or plan for securing traffic, developed co-operatively by a carrier and others, the purpose makes clear that the concessions offered are in respect to transportation.*"

[9] *See Counsels' Footnote d, supra.*

We hold that the district court properly refused to direct a verdict, properly submitted the case to the jury, and properly charged the jury. Substantial evidence supports the verdicts.

I.

A compressed review of the complex background facts relating to the promotion and financing of the Terminal is essential to an understanding of the issues.

For several years prior to 1954, Southern attempted to sell certain property in [763] Birmingham known as the Finley Yard. This was the site of an abandoned roundhouse and some twenty dilapidated buildings that became obsolete when Southern substituted diesel locomotives for steam locomotives. In January 1954 the Jefferson County Truck Growers Association, a farmers cooperative, showed an interest in the property as a possible location for a new produce market outside of the congested business section of Birmingham. The Truck Growers are not shippers or receivers of freight in interstate commerce, and could not conceivably compete with the plaintiffs. The Association's interest happened to coincide with a program of the railway for developing produce terminals in Chattanooga, Knoxville, Louisville, Richmond, and other cities as a bona fide freight-producing endeavor. So, the defendants say. Using the Truck Growers Association as a nucleus for a unified food warehousing facility located at a point outside the reciprocal switching district, Southern expected to gain new revenues estimated at $300,000 to $500,000 a year. The location would allow the Terminal to be served exclusively by Southern and its system lines, giving Southern a virtual monopoly of the produce traffic and forcing produce dealers in the area to move to the Terminal or perish. So, the plaintiffs say.

In April 1954, to help the inital promotion, Southern employed one Joseph DeOreo, a professional promoter experienced in railroad freight promotions.[8] Southern, working with the Truck Growers, expanded the project into a fully integrated food terminal, including cold and dry storage warehouses, to be used in storing, processing, and distributing food and related products. The facilities were to be leased for long terms, at the expiration of which the property would be sold to the tenants.[9] The organized efforts went on for months. They were open and above board. Anyone had the right to participate—a right of dubious value to established warehouses long settled at their own locations. In February 1955 Southern

[8] DeOreo helped promote the Union Pacific's Feed Terminal at Kansas City. See Union Pacific v. United States, 1941, 313 U.S. 450, 61 S.Ct. 1063, 85 L.Ed. 1435, footnote 18. According to the plaintiffs, DeOreo was to head off the efforts of the Truck Growers Association to build a new produce market of its own that might block Southern's scheme. Instead DeOreo was to use the Truck Growers to "corral" enough large rail receivers to force all of them to "join the parade or perish."

[9] *The property was originally to be sold prior to construction. The sale was described by an officer of Southern:*

> *... the sale of the Southern Railway property to individual business concerns who are expected to produce rail freight and revenue. This problem is not unique to Finley Shop area nor to Birmingham. The big difference here, of course, is the proposed underwriting by the Southern of $4,000,000 to $5,000,000 worth of improvements on the property.* (R. 950)

[10] *Promoter DeOreo was instructed by Southern's Line Vice President Brown as follows:*

> *"You had best operate alone as an expert in your field without the color of any particular railroad influence appearing at the outset. Naturally, our people would want to continue in quiet communication with you so that they and you could be jointly thinking about a site against the happy circumstance that success will attend your efforts."* (R. 884)

Only Mr. Shaw ever attended such a meeting (R. 283). Birmingham Ice did not learn of Southern's proposal until May 1955, when Southern had already made its commitment to build two new cold storage warehouses for Nelson Company and Terminal Cold Stor-

and other interested persons finally organized the Birmingham Food Terminal and incorporated it, primarily as a conduit to Southern but also to establish a legal entity to deal with financing companies and contractors. The Terminal corporation is a "shell"; it is a non-profit corporation having no office space and no employees.

The original stockholders in the Terminal Corporation were the prospective tenant-purchasers. Only two of these, Nelson Company and Birmingham Terminal Cold Storage Company, were competitors of the plaintiffs.

The organizers' plan contemplated a sale of the Finley property (84.935 acres at $2500 an acre)* from Southern through the Realty Company to the Terminal, without any down-payment and with the use of Southern's credit to obtain financing at a rate favorable to the purchasers. In payment, the Realty Company was to take a second mortgage from the Terminal on which four per cent interest would be paid annually, the principal to become due in twenty-five years. The Terminal Corporation was to finance the costs of construction by a loan from a lending agency, the loan to be guaranteed by Southern and secured by a first mortgage. Terminal would then lease the land and improvements to Realty Company for twenty-five years at a rental equivalent to the payments required under the first mortgage. This lease would be assigned to the lending agency as collateral security. Thereafter, the Realty Company would lease back to Terminal [764]

* *The plan contemplated the use of 102.02 acres, of which the tenants would be required to pay for only 79.686 acres, the use of the remainder, consisting of track strips and driveway areas would be donated by Southern.* (R. 241, 1036, 1033-34, 805-806). *See* 308 I.C.C. at 360).

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age Company (R. 303-304, 305, 962-963). Officials of Southern refused even to discuss the effect of their operation with Birmingham [illegible] except in the presence of the new competitors Southern had already agreed to subsidize (R. 305-306).

Corporation the same property for the same rental period at substantially the same rent. The property would then be sold to the tenant-purchasers, subject to the mortgage and leases.

To secure the first mortgage loan Southern would execute an agreement with the first mortgagor guaranteeing the performance of all the obligations assumed by Realty Company under its lease of the property from Terminal Corporation. The purpose of this guarantee was to permit each tenant to purchase his facility independent of the other tenants, without being required to make any down-payment on the purchase price. At the same time, it made possible a low interest rate because of reliance on Southern's credit. The purchase price included the interest costs of the interim financing required during the period of actual construction. The plaintiffs contend that the price did not represent anything like the full value of the property, since Southern was to pay a part of the costs and retain title to certain track and tramway areas. The alleged gap between the price and the value of the property is of critical importance, because the rental formula depended on the cost base.

After the company was organized, Terminal obtained a commitment for a construction loan from the Equitable Life Assurance Society. Terminal engaged a building contractor. The contractor ordered steel fabricated specially for the building. Many of the prospective tenant purchasers cancelled existing leases and made commitments preparatory to moving to the Terminal. The project was progressing smoothly according to plan when in September 1955 four competing carriers joined by Birmingham Ice, one of the plaintiffs here, filed a petition with the Interstate Commerce Commission questioning the legality of Southern's program for organizing food and produce terminals. Equitable Life promptly withdrew its commitment. The promotion collapsed.

Southern, faced with this emergency and under a strong moral obligation as well as a legal obligation to extricate the tenant-purchasers from their unhappy lot, agreed to go forward with construction of the project for its own account and thereafter lease the facility to the Terminal Corporation. A new agreement was entered into October 18, 1955, referred to in the proceedings below as the "Round Robin Agreement". This agreement requires Southern to complete the project and to lease the facilities to the tenant-purchasers under a separate lease to each, for a period of five years, with an option to renew for five years. Rental was fixed at the annual rate of eight per cent of the cost-base represented by the sales price, the Terminal Corporation to pay the costs of utilities and the Realty Company to pay taxes, insurance, and maintenance costs. The new agreement provides that the parties shall revert to their original plan, should that plan, to the satisfaction of Southern, be held valid by the proper authorities. The tenants were given an option to purchase the property at the cost price provided in the original plan at any time during the potential ten-year term of the lease.

The building was not completely finished until July 1957 but some of the tenants were permitted to occupy partially completed buildings at rentals based on percentage of occupancy and on the rental cost-base formula. In virtually all instances the billing and collection of these rentals lagged several months behind their due dates. As of January 1958, all of the tenants were in arrears since September 1957 or earlier. Nelson Company, the first occupant and the competitor the plaintiffs especially

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[1] *The so-called "legal obligation" embodied both the absorption of costs by Southern proscribed by the Commission, and the financing plan which was held in* Southern Railway Co. v. United States, *supra, to be illegal as "merely a more complex form of credit extension such as those condemned in* Vandalia R. Co., *supra.* C

condemn, moved in May 15, 1956. This company, a corporation with a capital of about $4,500, was furnished facilities costing more than $1,000,000. The Terminal finally evicted the company." (During the hearing before the Commission, Southern instituted an action against Nelson Company and Terminal Corporation for $135,000 in rental arrears.)" Birmingham Terminal Cold Storage Company, the plaintiffs' other competitor [765] at The Terminal, started with a capital of $1,000 (as any corporation may under the Alabama law). It was furnished cold storage facilities costing in excess of $1,000,000. This company too was evicted for non-payment of rent ($65,000)." The record shows, however, that a genuine dispute arose between Southern and the tenants over the proper amount of the rent under the Round Robin Agreement, because of the difficulty of ascertaining the accumulated costs essential to the computation of charges. This dispute delayed billing and collection of rents during the period of construction. It was not resolved until the tenants filed suit and a declaratory judgment was entered.

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[m] *Neither Terminal Cold Storage Company nor Nelson Company were actually erected. The stock of each was sold to H. C. Hudlow for the sum of $100 for each company, and the going business of each was transferred to Jefferson Cold Storage and Warehouse Company, a new $1,000 corporation organized by Hudlow, with the understanding that the new corporation would not pay any of the back rent owed by the companies which Hudlow had purchased* (R. 636-644, 655-656).

[n] *In the Commission proceeding Nelson testified that "regardless of any controversy he could not have paid his rent at any time"* (308 I.C.C. at 633). *Financial statements showing the insolvency of his company, introduced in the trial below, show the reason for that testimony* (R. 1109-1112).

[o] *See Counsels' footnote m, supra.*

[p] *The "genuine" dispute was merely an effort to further reduce rents. A declaratory judgment action was filed, with consent of Southern as part of an agreement to postpone, indefinitely part of all rent; Southern felt that the declaratory judgment action would help block pending damage suits* (R. 1036-1038). *No declaratory judgment settling any dispute has ever been entered. The action*

The Terminal has thirty buildings, several driveways, areas for future expansion, a restaurant, a filling station, and sixteen spur tracks. It occupies a rectangular area, 3,000 feet in length by 1500 feet in width. The buildings were constructed to the tenants' specifications, subject to certain basic standards. There are twenty-two tenants, not all of whom are stockholders of the Terminal Corporation. The buildings cost $6,125,690. According to Southern, the final rental-sale cost-base was $7,327,860; according to the plaintiffs, the minimum cost was $8,280,000. The difference of $952,000 represents items Southern allegedly improperly excluded from the cost-base."[9]

II.

Southern's motion for a directed verdict raises a serious question. Southern maintains that the plaintiff sued and tried the case on an indefensible theory; that even if it be

[9] Minimum Cost Exclusions by Southern—According to Plaintiffs.

Cost	Minimum Cost Table II	Cost Base Table III	Minimum Excluded
Paving, etc.	$ 619,586.42	$ 538,718.36	$ 80,868.06
Water System	107,502.98	110,577.19	(3,074.21)
Storm Sewers	217,516.85	211,437.45	6,079.40
Sanitary Sewers	54,221.31	51,278.81	2,942.50
Land	255,480.00	199,215.00	56,265.00
Grading	412,893.18	—0—	412,893.18
Tracks	111,000.00	—0—	111,000.00
Interest Cost	285,238.78	—0—	285,238.78
	$2,063,439.32	$1,111,226.81	$952,212.71

referred to is set for trial on April 23, 1962, together with an Elkins Act suit by the United States finally to require payment of rent on the basis of the Commission's order from 1957 to date. See Appendix E.

[9] *The sum of $952,000 is based wholly on costs figures established by a comparison of Southern's own records with its sworn answers to admissions and to interrogatories.* (R. 1036, 241, 417-118, 537, 118-120).

assumed that Southern violated Sections 2, 3(1), and 6(7) of the Act, the plaintiffs have failed to allege or to prove any injury to them caused by unjust *discrimination relating to transportation*, as required for the recovery of damages under the Act.

We note, first, that Sections 8 and 9 are narrower in scope than Sections 13(1) and 13(2). Section 8 allows an action for damages "to the person or persons injured . . . in consequence of any . . . violation" of the Act.[19] Section 9 allows "any person or persons claiming to be damaged" to sue in the district court. Section 13(1) allows "any person" to file a complaint with the Commission "complaining of anything done or omitted to be done by any common carrier . . . in contravention" of the Act. Section 13(2) allows the Commission to proceed on its own motion, and "no complaint shall at any time be dismissed because of the absence of direct damage to the complainant". Consequently, decisions dealing with the standing of a warehouseman to file a complaint with the Commission or decisions involving the validity of the Commission's cease and desist orders against warehousemen are not necessarily applicable **[766]** to a warehouseman's suit against a carrier for damages.

Section 2 prohibits "unjust discrimination" by "special rate, rebate, drawback, or other device", "directly or indirectly". Section 3(1) prohibits "any undue or unreasonable preference or advantage . . . in any respect whatsoever". Section 6(7) requires strict adherence to published tariffs, without regard to any particular discrimination; but, without the element of discrimination there can be no injury to one suing as a result of a departure from published tariffs. Each of these three sec-

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[19] See footnote 2

See Counsels' footnote 1, *supra*.

tions,[11] then, requires discrimination as an essential element of a violation of the Act upon which an action for damages may be based.[*] "What is unlawful in the action of the carriers inheres in its discriminatory quality and not in anything else." *Interstate Commerce Commission*

[11] Section 2 of the Interstate Commerce Act (48 U.S.C. §2) reads:

"If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property . . . , subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation . . . of a like kind of traffic . . . under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

Section 3(1) of the Interstate Commerce Act (49 U.S.C. §3(1)) reads:

"It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular persons, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . . ."

Section 6(7) of the Interstate Commerce Act (49 U.S.C. §6(7)) reads:

". . . nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation or passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

[*] *See Counsels' footnote a, supra.*

v. United States, 1933, 289 U.S. 385, 53 S.Ct. 607, 77 L.Ed. 1273.[11] In this connection, we note that Sections 2, 3(1), and 6(7) differ from the Elkins Act, which prohibits departure from the published tariff rates "irrespective of its actual discriminatory effect." Cases under the Elkins Act, therefore, are not necessarily applicable to the instant case."

The statutory prohibitions have been applied broadly,[12] but, in terms, the Act penalizes a carrier for discrimination only with respect to transportation. Thus, Section 2 prohibits rebates and special rates "for any service . . . rendered, in the transportation of passengers or property"; Section 6(7) repeats the phrase "transportation of passengers or property". Section 3(1) does not refer specifically to transportation, but it is construed as so limited: "[T]he act is intended to deal with transportation. . . .

[12] See United States v. Union Stock Yard and T. Co., 1912, 226 U. S. 286, 33 S.Ct. 83, 57 L.Ed. 226; Southern Pacific Terminal Co. v. I.C.C., 1911, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310; United States v. General Motors, 1955, 3 Cir., 226 F.2d 745; Central of Georgia R. Co. v. Ehling, 1917, 5 Cir., 238 Fed. 202; Vandalia R. Co. v. United States, 1915, 7 Cir., 226 Fed. 713; Cleveland C.C. & St. L.R. Co. v. Hirsch, 1913, 6 Cir., 204 Fed. 849, 852, 853

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[11] *This case involved a challenge under only Section 3 of the Commerce Act of blanket or group rates. The quotation referred to, in context, conveys a somewhat different meaning:*

> *"The Commission does not find, and the complainant does not assert, that the rate was unreasonable in the sense that it would be subject to condemnation if a like rate had been charged to others similarly situated. What is unlawful in the action of the carriers inheres in its discriminatory quality, and not in anything else. When discrimination and that alone is the gist of the offense the difference between one rate and another is not the measure of damages suffered by the shipper. . . ."*

The gist of the offense in these cases involves more than the discriminatory quality of Southern's practices—it involves indirect rebating devices prohibited by Section 2, and the granting of indirect tariff deviations and special privileges prohibited by Section 6(7).

[12] *See* Counsels' note b, *supra*.

The subject of the 'preference' or 'prejudice' is transportation of either persons or property." In re Huntington, S.D.N.Y., 1895, 68 F. [767] 881, 882. The Act defines "transportation" broadly. The term includes "all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and *all services in connection* with the receipt, delivery, transportation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported". 49 USCA §1(3). "Transportation", then, embraces terminal facilities used in the delivery, storage, or handling of freight—but this language does not solve the problem here. For discrimination, to exist, there must be a person prejudiced and a person favored. There is no proper basis for comparison unless there is substantial identity of situation and service, accompanied by an undue advantage to one, to the disadvantage of the other.[13] And, under Section 8, the plaintiffs still must show they were *injured by unlawful discrimination in relation to transportation.*[14]

Pittwood v. Northern Pacific Ry. Co., 1918, 51 I.C.C. 535 is the only decision passing on the validity of a warehouseman's claim for damages against a railroad for an unjust discrimination.[14] Pittwood owned and leased a building, suitable for a warehouse, immediately adjacent

[13] See United States v. Baltimore & O. R.R., 1908, 4 Cir., 165 Fed. 113, 121, rev'd on other grounds, 1910, 215 U.S. 481, 30 S.Ct. 164, 54 L.Ed. 292; United States v. Oregon R.R. & Navigation Co., 1908, D. Ore., 159 Fed. 975, 979; Logan Coal Co. v. Penn-Sylvania R.R., 1907, E.D. Pa., 154 Fed. 497, 500; Delaware, L. & W. R.R. v. Kutter, 2 Cir., 147 Fed. 51, 63, cert. denied, 1906, 203 U.S. 588, 27 S.Ct. 776, 51 L.Ed. 329.

[14] Commenting on the dearth of personal injury actions under provisions of the Federal Communications Act comparable to Sections 8 and 9 of the Interstate Commerce Act, the court stated, in Cutrair v. Mackay Radio & Telephone Co., S.D.N.Y., 1954, 123 F. Supp. 83, 89: "The absence of any such proceeding before the

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[14] *See Counsels' notes s, t, and t, supra.*

to the Northern Pacific railroad tracks in Spokane, Washington. He filed a complaint with the Interstate Commerce Commission asking for damages on the ground that the Northern Pacific rented warehouse property to shippers at nominal rentals. Pittwood contended that because of the carrier's low rentals he was unable to obtain a tenant. The Commission held: "A warehouse owner, a landlord seeking to rent his property, as such, has no relation with a common carrier which could result in a discrimination against him in violation of the act to regulate commerce. The discrimination there forbidden is in respect of transportation." The discrimination, such as it was, "was directed not against complainant or other warehouse owners, but against those shippers who were not lessees of defendant's warehouse"; "manifestly" the damages allegedly suffered "were not the direct and proximate consequences of discrimination between shippers by defendant". Later, Fireproof Storage Company, the successor in interest of Pittwood, filed suit for damages in the district court, relying on the same facts Pittwood had relied on in the I.C.C. proceedings. The court dismissed the complaint, stating: "[A] warehouse owner is not entitled to recover damages for depreciation in the rental value of his property as a result of leases by a railroad company of similar property at nominal rentals to shippers." *Fireproof Storage Co. v. Hines*, E.D. Wash., 1919, 261 Fed. 215, 217. [15]

Interstate Commerce Commission or before the Federal Communications Commission and the absence of any such action in the Federal courts shows the construction which has been placed on Sections 8 and 9 of the Interstate Commerce Act and on Sections 206 and 207 of the Communications Act by members of the Bar who specialize in personal injury actions."

[15] Mr. Pittwood was not a man easily discouraged. He intervened in Leases and Grants of Property by Carriers to Shippers,

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* *Pittwood was not a warehouseman, he merely owned real estate by the railroad; he claimed no injury to a warehouse business. The* Fireproof Storage Company *case was not a suit for damages.*

[768] The plaintiffs insist that in a later case the Commission overruled Pittwood. They refer to *McCormick v. Pennsylvania Railroad Co.*, 1925, 95 I.C.C. 301; 1928, 148 I.C.C. 299; order sustained in *Terminal Warehouse Co. of Baltimore v. United States*, D.C.Md., 1929, 31 F.2d 951. In the first McCormick case, the warehouseman complained to the Commission that three railroads in Baltimore had made concessions to certain preferred warehouse companies. McCormick conceded it was not "in any sense a shipper or receiver of freight." The Commission, relying on Pittwood, held: "When consideration is given to the assertion of complainant that it is not a shipper or receiver of freight, the conclusion must be reached that it has no relation with a common carrier which could result in a discrimination against it in violation of the Interstate Commerce Act. The discrimination there forbidden is in respect to transportation." McCormick then amended the complaint by eliminating all of the defendants except the Pennsylvania and alleging that both complainant and Terminal Warehouse Company, the preferred warehouse company, were shippers served by the Pennsylvania.

1922, 73 I.C.C. 671, a proceeding instituted by the Commission on its motion. The Commission said: "In this proceeding, no shipper or receiver of freight at Spokane complained of the leases made by the railway company or alleged that they were in any way unduly prejudicial to him or unduly preferential of his business competitors. Complaints were made by owners of warehouses in Spokane, who contended that they were unable to lease their properties on advantageous terms because of the competition of the railways in the matter of rental charges. One of these complaints was separately heard in Spokane at the time of the hearing in this investigation. The complainant was not a shipper, and we held that we were without jurisdiction to grant the relief requested. Pittwood v. N.P.Ry.Co. . . . See also Fireproof Storage Co. v. Hines. . . ." 73 I.C.C. at 681

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it was an action for injunctive relief which the court probably had no jurisdiction to grant, the language quoted is merely description of the Pittwood *case.*

The amended complaint charged that the Pennsylvania, in the form of allowances for loading and unloading carload package freight, made refunds to Terminal, thereby collecting less compensation from Terminal than it collected from McCormick for "rendering like and contemporaneous transportation services under substantially similar circumstances and conditions, in violation of Sections 2 and 3" of the Act. After a hearing on the amended complaint, the Commission issued a cease and desist order. Terminal filed suit in the district court to enjoin and set aside the order. The Court approved the order of the Commission.

We do not read McCormick as overruling Pittwood.[*] Nor does it appear that the Commission considered that it was overruling Pittwood. After amendment of the complaint, McCormick concerned two shippers and a discriminatory allowance to one for what were clearly transportation services. Moreover, McCormick was not an action for damages, as was Pittwood, but was a proceeding for a cease and desist order. As the Commission itself recognized in the proceeding instituted by Shaw Warehouse against Southern, "[t]he Commission is the guardian of the general public interest and proceedings before it are not in the nature of private litigation". *Shaw Warehouse Co. v. Southern Railway Co., et al.*, 308 I.C.C. 609, 611 (1955).

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[*] *See the view of* McCormick *case taken by Mr. Justice Cardozo in* Terminal Warehouse Co. v. Pennsylvania R. Co., 297 U.S. 500, 505-506, 511-516 (1936), affirming 78 F.2d 591 (Cir. 3, 1935), overruling 7 F. Supp. 484 (Ed. Pa. 1934). *There a warehouseman sued under the Clayton Act complaining of injury to his business by reason of railroad conduct which the Commission had held violated the Commerce Act; it was held that he could not sue for damages under the treble damage provisions of the Anti-Trust Act because the exclusive remedy for such a warehouseman was under Sections 8 and 9 of the Commerce Act. See also the view of Three-Judge Court relative to* Pittwood *and* McCormick *cases in Counsels' note (*) the opinion on rehearing, infra.*

Nevertheless, the second McCormick opinion is based in part on reasoning that supports the plaintiffs' position here. The Commission stated: "It is our view that the Terminal [Warehouse Co.], even though not the owner of the goods, has been given dominion over such goods for transportation purposes and that accordingly for transportation purposes it should be deemed to be the consignor of shipments from and consignee of shipments to its warehouse."[16] 148 I.C.C. [769] 301, 306. Similarly, Judge Lynne, in *Southern Railway Co. v. United States*, 1960, 186 F. Supp. 29, 42, speaking of the same warehouse companies which are the plaintiffs here, pointed out that warehouses, like freight forwarders, are so closely connected with transportation that they should have the status of shippers and receivers of freight.

The Supreme Court has sanctioned this principle in cases upholding orders of the Commission. *Merchants Warehouse Co. v. United States*, 1931, 283 U.S. 501, 51 S.Ct. 505, 75 L.Ed. 1227, affirming D.C.E.D.Pa., 1930, 44 F.2d 379, sustaining *Gallagher v. Pennsylvania R. Co.*, 160 I.C.C. 563 (1929); *Terminal Warehouse Co. v. Pennsylvania R. Co.*, 1936, 297 U.S. 500, 56 S.Ct. 546, 80 L.Ed. 827, affirming 3 Cir., 1935, 78 F. 2d 591, overruling D.C.E.D.Pa., 1934, 7 F. Supp. 484. See also Propriety of Operating Practices—New York Warehousing, 198 I.C.C. 134 (1933), 216 I.C.C. 291 (1936); affirmed, 220 I.C.C. 102

[16] In the McCormick case there is no intimation that all warehousemen should be treated as shippers. In its opinion, the Commission carefully mentioned specific referents: the dealings of the defendant carrier were with the complainant, and not with the owners of the freight; as to many of the inbound shipments, the complainant was the only party to whom delivery of car-load shipments could be made, the real owners being out-of-town companies which shipped to the complainant for distribution in less-than-carload lots; the owners gave the complainant dominion over the goods for transportation purposes.

[*] *Relative to the* Terminal Warehouse Co. *case see note x, supra.*

(1937); and sustained, *Baltimore and Ohio R. Co. v. United States*, 20 F. Supp. 273 (1938), affirmed 1939, 305 U.S. 507, 59 S.Ct. 284, 83 L.Ed. 318.[17] In the Baltimore and Ohio case one of the carriers had leased space to a warehouse company at less than the cost of the space to the carrier. The Supreme Court observed that unlawful discrimination even as to non-transportation services violates Section 6(7), since "a savings on the non-transportation services obviously figures out the

[17] Propriety of Operating Practices—New York Warehouses, 198 I.C.C. 134, (1933) and 216 I.C.C. 291 (1936) aff'd 220 I.C.C. 102, 1937, was a result of the Commission's comprehensive investigation of indirect concessions by railroads to warehouses in the New York area. Some of the railroads granted concessions, such as the in-transit service of removing cargo from water carriers, storing the cargo for a long period, and reloading it upon railroads, at noncompensatory rates. The nature of some customers' business prevented their using this in-transit service. On the complaint of competing warehouse operators the Commission issued an order directing certain carriers to cease performing the services at less than compensatory rates. The carriers brought suit to enjoin enforcement of the order, contending among other contentions the Terminal facilities were not transportation services. In Baltimore & Ohio R. Co. v. United States, 1939, 305 U.S. 507, 59 S.Ct. 284, 83 L.Ed. 318, aff'g 20 F. Supp. 372, the Supreme Court affirmed the district court's dismissal of the suit. The Court stated

> "As the shippers of the Port of New York district can utilize, in many instances, commercial storage and other warehousing services in addition to rail transportation, a saving on the non-transportation services obviously figures out the same as a rebate on the transportation service. It is immaterial that the shipper pays fair value or the market price for the extra-privilege he enjoys. Section 6(7) of the Act forbids the carrier to receive less than the published rates for transportation or to remit 'by any device any portion of the rates.' When services, not necessary for transportation, are furnished below cost, in an effort to acquire rail transportation, as was done here, this provision is violated. . . ."

In this case the Court found that by furnishing commercial warehouse services (non-transportation services) at less than cost the carriers were, in effect, making a concession from published freight rates, a clear violation of Section 6(7). It is less clear that the carriers violated Sections 2 and 3(1), but, it should be noted, the discrimination was in favor of *shippers* using the railroad-owned and railroad-operated warehouses.

same as a rebate on the transportation service." See also *Union Pacific v. United States*, 1941, 313 U.S. 450, 61 S.Ct. 1064, 85 L.Ed. 1453, a case under the Elkins Act, however, in which the carrier, operating a food terminal with a city, was required to charge rentals on the basis of the fair rental value of the facilities.[18] Emerging [770] from these cases "is the clear rule that rents railroads charge for facilities leased for the purpose of attracting freight must be no less than the prevailing market rents in the area".[*] Judge Lynne, in *Southern Railway Company v. United States*, 1960, 186 F. Supp. 29, 37.

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[18] In this case the Union Pacific joined with Kansas City, Kansas, to promote a food terminal with cold storage facilities. The food terminal formerly supplying the city was located in Kansas City, Missouri, and was served by several railroads. The Union Pacific was the only railroad in a position to serve the new market. To induce the merchants to move, the Union Pacific offered to make good losses and expenses caused by moving, take over leases, and give free rent, bonuses, and advertising. The district court enjoined the City and the Union Pacific from giving such concessions on the ground that it resulted in a lowering of the published tariffs and constituted rebates to the favored shipper in violation of the Elkins Act. The Supreme Court, affirming the district court said: "The statute specifically requires that the concession given or received shall be 'in respect to the transportation of any property in interstate or foreign commerce by any common carrier.' As the language of the section covers indisputably the carrier and the freight involved in movement into and out of a metropolitan terminal market, only the phrase 'in respect to the transportation' requires analysis. What has been said shows its meaning connotes more than discrimination in payment of tariffs. Offering or soliciting the concessions explicitly violates the section. . . . The concessions are none the less illegal, if made for non-transportation services, as long as they result in lowering directly or indirectly transportation costs to a shipper. . . . Where traffic is an object, and discriminatory advantage the means employed in attempting to obtain or actually obtaining it, there is a violation of the section in respect to transportation."

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[*] *The paragraph quoted reads in full:*

"Emerging from these cases is the clear rule that rents railroads charge for facilities leased for the purpose of attracting freight must be no less than the prevailing market rents in the area, and no less than compensatory, including the normal return on capital employed in like enterprises, whichever is

These cases are all distinguishable from a damage suit, for the reasons previously stated. However, they establish the principle, pertinent here, that for purposes of determining discrimination relating to transportation, a warehouseman, aggrieved by a carrier's favored treatment of a competing warehouseman, comes within the long protective reach of the Act—although he may not be a shipper and although the alleged discrimination itself is primarily of a non-transportation nature.

Consignment of freight to warehouses and the services performed in receiving, handling, storing, and delivering freight do relate to transporting goods in commerce. The question narrows then to whether: (1) the particular warehouseman in suit is so directly in the stream of transportation that he should be treated as a shipper on a competitive basis with actual shippers or with other warehousemen who must be treated as shippers; and (2) is also so similarly situated that he would be affected adversely by the carrier's favored treatment of a competitor. Pittwood's viability and lonely position as the unique precedent against a warehouseman's suit for damage are not inconsistent with these views. In Pittwood the injury was to a landowner whose real estate investment depreciated in value; the injury was not the result of discrimination with relation to transportation. The instant case is somewhere between Pittwood and McCormick.

The question is essentially a factual one that should be resolved by a jury. (1) Southern, however, makes a good case for its motion for a directed verdict. The concessions, if any, were in favor of tenants against non-tenants; not in favor of some users of the railroad against

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higher. A carrier is prohibited from engaging in such non-carrier business because it can offset any losses against carrier revenues. It cannot operate noncarrier business as a means of securing freight business free of the Commerce Act's required standards for carrier conduct.

other users in similar circumstances. And, a decline in rental value of warehousing property in downtown Birmingham was inevitable after Southern trebled available warehousing space in the city and put up a modern food terminal with cold and dry storage facilities.[38] It is not shown that Southern exerted any control over the rates or trade practices of the tenants.[39] There is no evidence that any customer, allegedly enticed to the Terminal by a tenant competitor, ever shipped or received anything by rail. None of the plaintiffs is a shipper, receiver, user, or customer of the railroad. **[771]** No shipper testified against Southern. The Terminal was constructed to attract a variety of businesses. For example, the Truck Growers, producing no freight traffic, occupied one-fourth of the total area. (2) But the plaintiffs have a story to tell, too. They were in competition with two of the Terminal's tenants. It is a fair inference that these competitors passed on to their customers the concessions the railroad made to them. One of the plaintiffs, Shaw Warehouse, operates two public dry storage warehouses in Birmingham, both of which are served exclusively by Southern. Mr. Shaw described his company as a "freight station." All of the plaintiffs operated businesses that were a part of the rail freight distribution system: each received and shipped for customers, advanced freight charges at times,

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[38] *This argument was rejected in* Baltimore & Ohio R. Co. v. United States, 20 F. Supp. 273, 278, (D.C. Md. 1938), affirmed 305 U.S. 507 (1939), *where the Court stated:*

> *"It is no answer to the violations of the Statute to say that as the railroad has a losing piece of property on its hands which it has acquired in good faith it should be permitted to rent it for its fair value. That is true only so doing does not violate the law. While it may lawfully minimize its losses from bad investments it may not give concessions to a favorite shipper."*

[39] *The practices were certainly made known to Southern when attacked in the Commission in July 1957.* (R. 87) *Their continuation was made possible only by Southern's continued failure to collect rent.* (R. 24-26, 1100-1101).

and handled in-transit shipments, stopover cars, and pool cars.

The Court is unwilling to say, as a matter of law, that a warehouse company cannot recover damages for unjust discrimination unless it is a shipper or user of the rail road, or that, in this case, the evidence shows beyond a reasonable doubt the plaintiffs were not injured by discrimination with respect to transportation. We prefer to err, if it be error, on the side of carrying out the broad policy of the Act of eliminating concessions by a railroad of any kind, direct or indirect, to the end that persons in the stream of transportation may carry on their business on an equal basis with their competitors: "The Interstate Commerce Act . . . uses language of the broadest type to bar discriminations of all kinds." *Boynton v. Virginia*, 1960, 29 L.W. 4049. That policy requires us to narrow, not widen, a carrier's escape hatch from liability for violation of the anti-concessions provisions of the Interstate Commerce Act. We hold then that it is a question of fact for the jury whether, in the circumstances of the case, the injury to the plaintiffs, if any, was caused by unjust discrimination in relation to transportation. This type of case requires the trier of facts to sift involved facts and contradictory inferences. It is a case a jury is peculiarly fitted to decide.

III.

The first major issue put to the jury was whether, "in view of all the circumstances" the Terminal rents were "less than a fair rental". The Court defined a fair rental as "the fair market rental" and also as "a compensatory rental" yielding a fair return on capital. In his instructions, the trial judge made it clear that there is nothing necessarily improper in a carrier's ownership and operation of a terminal; a carrier's furnishing of facilities or services to shippers or to persons assimilable to shippers

may violate the Act only if the facilities or services are furnished at such rates as to amount to an undue concession or discrimination. The issue comprises several subissues. One of the most important concerns depreciation.

The record shows that the prevailing practice in Birmingham was to figure rent on the basis of eight per cent of the value of the land and ten per cent of the value of construction costs and certain other expenses. The record is not so clear as to the applicability of this rule of thumb, regardless of time, place, and type of property. All the witnesses agreed, however, that the only reason for a rental rate greater than eight per cent was the element of depreciation. Southern used eight per cent as the rental factor on construction costs. Should Southern have included depreciation in its rental formula? Was the trial court correct in instructing the jury that if Southern and the tenants intended at all times to revert to the original sales plan, the element of depreciation should not be included in determining the adequacy of the rents?

Southern did not work depreciation into the rents and the trial judge charged as he did, because the original agreement between Southern and the tenant-purchasers was that the property and facilities would be purchased at undepreciated cost, the rentals paid in the [772] interim *not* to be credited to the purchase price. The "Round Robin Agreement" of October 18, 1955, also bound the tenants to purchase. There is nothing in the record to show that the tenants are not ready, willing, and able

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[fn] The record showed explicitly the financial insolvency of both competitor companies. (R. 1100-1103, R. 24-26); both had surrendered all interest in the Terminal facilities almost two years prior to the date of trial, their businesses were transferred to Jefferson Warehouse and Cold Storage Company in 1958, the rents owed by these companies have never been paid; Southern agreed that Jefferson Company would not be required to pay them. (R. 637, 640-641, 645, 654-655).

to go through with the purchase if, according to the agreement, the original sale plan is determined by proper public authority to be valid.

The plaintiffs' theory is that the charge was erroneous, even if eventually the property would be purchased at the undepreciated cost, because the rent would result in the indirect loan, without interest, of the depreciation—until the sale occurred. As a result, they argue, the carrier unlawfully furnished working capital to the tenants.

The argument carries a little aroma of plausibility. Depreciation, however, should not be reified. It is not a tangible thing that can be given or received. Depreciation is an assumed decline in value, or loss, attributable to wear and tear, taken into consideration for various purposes, with the hope that the owner can restore his capital asset at the end of its estimated life by amortizing its cost over its life span. The plaintiffs' theory would allow Southern to recover the depreciation twice, once in the sale and a second time by including the element of depreciation in computing the cost-base for rentals.[dd]

The trial judge instructed the jury that if it found the Terminal's tenants did not intend to purchase the property, the jury should consider depreciation in deciding the adequacy of the rents. Several times, once in response to a question from a juror "about the compensatory part", the trial judge carefully stated that question for the jury: "Were the rents charged the tenants less than the fair market rent or less than compensatory rent." So stated, the instruction is favorable to the plaintiffs. It is not contended that the rents were

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[dd] *Petitioners would not require the recovery of depreciation twice; they do seek damages for injuries which resulted from Southern's failure to collect even once. See Counsels' note cc, supra.*

below cost,* but only that Southern furnished facilities at less than a compensatory return on the full value of the facilities. We consider that fair rental value, that is "fair market rent", rather than a compensatory return is the proper standard at least in this type of action, because the suit rests on a claim for damages caused by destructive competition. There is authority, however, that even in an I.C.C. proceeding the "cost of facility is only persuasive". *Union Pacific Railroad Co. v. United States*, 1941, 313 U.S. 450, 61 S.Ct. 1064, 85 L.Ed. 1453. As we read the record, and considering the warehouse space in the Birmingham area, the jury could have concluded that the plaintiffs failed to show that it was economically feasible for Southern or for the warehousemen to obtain tenants willing to pay rent that would yield ten per cent on warehouse buildings. This Court must assume that if the jury found it necessary to consider depreciation, it found that the rents were not only at the market value but yielded a compensatory return.

B. The warehousemen level a broadside at the purchase price as an illegal concession, charging that by omitting certain proper cost items Southern would allow the tenants to purchase at less than cost and, in the meantime, the tenants are paying rents (based on the purchase price) that are too low.[19] These items include: (1) the value of the land in excess of $2500 an acre, (2) cost of removing tracks and demolishing existing structures, (3) cost of installing service tracks, (4) cost of paving areas,

[19] See footnote 9.

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* *This is not true. Petitioners have consistently so maintained: Southern's rental operating costs exceeded $2,000,000 for the period during which Southern collected from the entire Terminal only a little over $800,000 in rent, and charged off, for tax purposes, almost $1,000,000 in depreciation alone.* (R. 36, 760, 121-125) *During this period over $250,000 accrued in back rents owed by Petitioners' primary competitors were never collected at all.*

(5) cost of grading and levelling areas to be used for building construction, expansion areas, and driveways, (6) value of land for tracks and vehicular areas. There is a great mass of conflicting evidence on the items alleged to have been improperly omitted.[**] Southern produced witnesses who testified[**] that: (1) the value of land did not exceed $2500 an acre; (2) the cost of removing tracks and razing old buildings would have been incurred without construction of the Terminal and are not an includible item **[773]** in determining the cost-base; (3) some of the tracks were adjacent to the Jefferson County Truck Growers Association (neither a shipper nor receiver of freight by rail), some were not in the Terminal area, some were for public loading and unloading, some will be retained by Southern for future expansion; (4) paving costs, except for track areas, were included in the rent base and proposed purchase price; (5) the grading entailed merely excavating the land and spreading it, without any substantial enhancement in the value of the property. In final analysis the propriety of Southern's including these items in fixing rentals and the weight to be attached to any one or more of these items were questions for the jury.

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[*] *The fact of the omission of each of these items was proved not by a mass of conflicting evidence, but by Southern's own sworn answer to requested admission 16(d).* (R. 111-112).

[**] *Southern produced no witnesses on any of the numbered items listed in the opinion except with respect to the value of land. Such witnesses did appear before the Interstate Commerce Commission which rejected their testimony. Southern's appraiser testified that the tracks increased the value of buildings* (R. 716); *no witness explained the exclusion of over $80,000 paving costs* (*Compare* R. 539 *with* R. 1036, *See* R. 708); *no witness explained why no part of the over $400,000 grading costs was added to Southern's land charge of only $190,215.* (R. 13, 15, 535-537, 1036. *See* R. 18, 945); *Southern's agreement to exclude grading costs occurred between March 1955, when the proposal was to add all grading costs to the land price* (R. 944-946), *and August 1955, when this cost was entirely absorbed by Southern* (R. 11, 18). (*See* Shaw Warehouse Co. v. Southern R. Co., 308 I.C.C. 609 at 630).

C. The original purchase plan contemplated Southern's transfer of 85 acres for $212,500 on a 25-year 4% second mortgage with no payments on principal until the end of the term. In addition, Southern was to spend $355,000 secured by a similar mortgage with the requirement that the principal be paid during the 25-year term. And, Southern guaranteed 90 per cent[hh] of the first mortgage obligation. Appellants assail the purpose and terms of these mortgages and the guarantee: their purpose—to make it unnecessary for the tenants to use working capital; their terms—lower than the prevailing market terms. Southern justifies the plan as a means of protecting itself, in the event the Terminal project failed. There is no question of the importance to a railroad of the land adjacent to its lines. Such property has strategic traffic-produced potentiality and is vital for any possible future construction of new lines. The explanation is for the jury.[ii]

D. The final paragraph of the charge summarizes the issue and puts the question squarely to the jury:

> "When new facilities are constructed by a railroad and rented to tenants whose business includes the shipment or receipt of rail freight as owners or as consignees or consignors the total rental charged must not be less than an amount which will fully cover a fair return on that plus taxes, insurance, depreciation and maintenance and no such new construction should be undertaken unless there is assurance with all reasonable certainty that such rentals can and will be collected. (And that's to be taken in connection with

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[hh] *Southern was to guarantee 100% of the first mortgage bonds* (R. 91, 97).

[ii] *The question of the legality of the guarantee was not even submitted to the jury; the trial court charged the jury that there was nothing wrong with the guarantee* (R. 796).

my previous instruction to you that if it is intended that the purchase plan be carried out you would strike from that the factor of depreciation in computing a compensatory rental.)"

This part of the charge is based directly on Practices of Carriers—Packing Sheds, 1941, 246 I.C.C. 273, 283. The appellants requested the charge, except the portion in parentheses. In deciding the first major issue, the jury had to sift uncertain and fluctuating variables in the concept of a "fair return", as well as to weigh contradictory testimony and inferences. Taking the record as a whole, substantial evidence supports the jury's finding.

IV.

The second major issue submitted to the jury dealt with the collection of rent from the tenants.

A. The district judge charged the jury: "Did the Southern Railroad, in view of all the circumstances disclosed by the evidence, exercise due deligence in collecting the rent charged?" The appellants excepted to the charge on two grounds: (1) "due diligence" is not the test; (2) unqualified and undefined, as it was in the charge, the "due diligence" test permitted the jury to speculate and consider immaterial facts.

A carrier by failing to collect its charges extends credit, thereby unlawfully furnishing working capital to a debtor, shipper or tenant. Thus, when a railroad extended four months' credit to a shipper on freight bills, the court considered the extension an undue concession because it was equivalent to the carrier's lending the shipper money at [774] no interest. *Hocking Valley RR. Co. v. United States*, 6 Cir., 1914, 210 F. 735, cert. den. 234 U.S. 757, 34 S.Ct. 675, 58 L.Ed. 1579. The statutory test, however, is one of reasonableness. The Act condemns "undue or un-

reasonable" concessions.[jj] In the Hocking Valley cases, there was no evidence of due diligence by the carrier; the indictment charged that the carrier made no demand for payment and made no effort to collect the debt. The court stated the problem as one depending on the facts of the case:

> "We do not say that all credit or forbearance is discrimination. A practice by which those shippers or consignees who had established their financial credit and satisfactory business habits were suffered to delay payment until convenient, but frequent, settlement periods, while others were required to pay cash on delivery, might not be, of itself, forbidden. Delays caused by inability to collect or an extension of time given as the best means of treating a past-due and doubtful freight account, might be justified. These thoughts do not reach a case where it was agreed before shipment that the favored should have the incidental delays and forbearance customarily given to all shippers, and should then, in addition, receive a considerable further extension of credit while cash payment was then to be collected from all others." 210 F. at 744.[kk]

In view of the language of the statute prohibiting *undue* concessions, the charge properly instructed the jury to

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[jj] *See Counsels' note a, supra. Petitioners have consistently contended that the Interstate Commerce Act condemns outright any rental practice which has the practical effect of continuously enabling the tenant to do business on the capital of a railroad.*

[kk] *The original lease was an advance agreement to postpone recovery of depreciation costs until a future uncertain purchase was made at an undepreciated cost price. See Appendix E. A year after its original occupancy Southern agreed to postpone for another six months Nelson Company's first 6 months' rent by the acceptance of a note for over $20,000; this note was not paid when due, and remained uncollected at the time of trial. (R. 1025-1026, 1102-1103). In April 1958 Southern entered into a further agreement to postpone collections of part of all rent. See counsels' note k, supra.*

consider whether the defendants exercised *due* diligence in collecting the rent. Appellants do not suggest, here or in their requested charges, that the law imposed a higher degree of duty on the carrier.

When a trial judge instructs a jury in plain language, using common words to express a clear thought, he is under no duty to paint the lily. An unnecessary definition or useless qualification is more likely to obscure than to clarify. Here, the only possibility of the jury's misunderstanding was eliminated by the court's further charge restricting "all of the circumstances disclosed by the evidence" to "every circumstance that bears on that issue, fail[ure] to exercise due diligence to collect the rent". The question of eliminating certain circumstances or issues from the jury's consideration could be raised, and was raised below, by the defendants' requested charges. The trial judge properly charged the jury.

B. There is considerable evidence in support of the plaintiff's position. Some of the tenants, including tenants not competitors of the plaintiffs, had poor credit ratings and were thinly capitalized corporations. Nelson Company, one of the plaintiffs' direct competitors, had a net capital of only $4,000 and paid[mm] a monthly rental of $7,760 for cold storage warehouse facilities expected to cost $1,000,000 that finally cost $1,400,000. The company was sent no rent bill for ten months. When the first six months' rent was long overdue, Southern, in effect, postponed payment for another six months by taking a note for the rent. It was never paid. The company was sued for arrearages of $135,000. While at the Terminal its revenues amounted to $242,000 in 1957 and

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[ll] *See Counsels' note jj, supra.*

[mm] *Nelson Company never paid but two months rent and that was at a reduced figure* (R. 1102).

$293,000 in 1958. Operating losses mounted, but Nelson increased officers' salaries, paid off back salaries to its president, and offered free services in handling the delivery of goods. Nelson was expected to produce 2500 carloads of freight a year. Birmingham Terminal Cold Storage, the other direct competitor of the plaintiffs, was usually six months in arrears, operated on a profit for only two months, and when it left the Terminal, was $65,000 in arrears for rent. The facilities constructed for these two companies were leased to a newly formed corporation, the Jefferson Company, owned by a man who had under lease similar facilities in Chattanooga, Tennessee. At the time he took over the space in the Birmingham [775] Terminal, he owed from $65,000 to $98,000 on his Chattanooga lease.

The jury heard all of this. It heard that Nelson moved in fourteen months before the Terminal was completed; that the president of the company was ill for four months.[ss] It heard that a bona fide dispute between the Terminal and all of its tenants as to the rental-sale cost-base held up collections at the start and impeded collections until settled by a suit for a declaratory judgment.[tt] It heard too that Nelson Company had a "good" credit rating;[uu] that the operator of the Birmingham Cold Storage Company had a "good" credit rating and had developed a

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[ss] *At the time of such illness the company was already over 12 months in arrears in its rent* (R. 1024-1026).

[tt] *There had been no such declaratory judgment. The matter has not been set for trial until April 23, 1962. See Counsels' note f, supra.*

[uu] *The Dun & Bradstreet credit rating of Thomas N. Nelson & Company in 1955 was "D 2-(new)-35,000-50,000-Good; 2X to D 2-(old)-75,000-500,000 annual sales"* (R. 957). *In September 1955 it had a total capital of $4,422.36; in May 31, 1956 when it entered its premises under an agreement to pay a rental of $7,758.97, its total capital was $3,404.96* (R. 991, 1100, 1102).

prosperous cold storage business in Gadsden, Alabama.[ss] Prompt eviction is not necessarily the best way to collect rent. There is evidence that Southern made reasonable efforts to collect the rentals, sent out bills promptly after the dispute with the tenants was settled,[tt] took a note from the president of Nelson Company to aid, not impede,[uu] collection of the rent, and made other efforts to collect—short of eviction. Southern, according to its evidence, exercised a reasonable business discretion, then when the efforts to collect proved fruitless, Southern required Nelson and The Birmingham Terminal Cold Storage to vacate the premises, and filed suit for rent arrearages.[vv] There is no evidence in the record that Southern had any agreement or understanding with any tenant that rents were not to be paid or that rents might be delayed.[ww]

We cannot say, as a matter of law, that the failure to collect rentals was so lacking in diligence that it constituted a violation of the Act. The trial judge properly submitted the question to the jury. Sufficient evidence supports the jury's verdict.

V

"A cause of action does not necessarily arise from those acts and omissions of a common carrier that may subject it to a criminal prosecution by the government, or to corrective and coercive proceedings at the instance of

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[ss] *Thompson Bonding Cold Storage had a Dun & Bradstreet credit rating of D 2-35,000-50,000 good* (R. 957), *but the rental agreement was made, not with this partnership, but with Birmingham Terminal Cold Storage Company, a new corporation with only $1,000 paid-in capital* (R. 980, 41).

[tt] *See Counsels' notes q, cc and oo, supra.*

[uu] *See Counsels' note rr, supra.*

[vv] *See Counsels' notes m and n, supra.*

[ww] *See Counsels' notes rr and p, supra.*

the Commission." *Pennsylvania R.R. Co. v. International Coal Mining Co.*, 1913, 230 U.S. 184, 33 S.Ct. 893, 57 L.Ed. 1446. To recover damages in private litigation, the plaintiff must prove a specific injury resulting from the carrier's acts and omissions.

A. In this case the evidence showing the causal connection between Southern's rental practices and the plaintiffs' loss of business is thin.[v] There is no direct evidence that Southern controlled the rates and business practices of the plaintiffs' competitors at the Terminal, or that these rates and business practices (not honest competition) were the cause of plaintiff's alleged loss.

Boggs, a company in the cold storage since 1948, contends that the Terminal forced it out of this business; it is now in the brokerage business. But Boggs was losing customers to other warehouses than the Terminal before the Terminal began in business. It is not shown that any particular customer left Boggs because of reduced rates or other attractions offered by tenant-competitors at the Terminal. At least one former customer of Boggs said that he was forced to withdraw because of "prohibitive rates."[vv]

Since 1927 Shaw has operated a public dry storage warehouse business, stored food and other products, and maintained rental offices for food brokers. Shaw has two warehouses served by Southern. It is far from clear that Shaw showed any injury or loss of business during the relevant years. Mr. Shaw testified that Nelson solicited his customers and offered them free delivery and air conditioned offices, but the record does not show that Nelson's

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[v] *See Counsels' note d. supra.*

[vv] *Evidence was introduced showing direct transfer of accounts from Boggs Company to Terminal tenants* (R. 1046-1053); *the exact amount of rate reductions was expressly set out* (R. 1113),

solicitations induced any customers to leave. Mr. Shaw testified that he lost three customers. Two went to other warehouses than the Terminal's; and the third was only a potential customer. Operating income rose from $202,000 in 1955 to $346,000 in 1958.[35] During the time when competition with the Terminal was greatest, the company [776] increased the president's salary from $13,000 to $24,700. In 1955 Shaw Warehouse doubled its storage by constructing an addition to its main building that added 35,000 square feet of storage space. In 1957 Shaw Warehouse leased buildings in Birmingham containing additional space. The company has consistently operated at a profit.

Birmingham Ice, founded in 1881, has operated a public cold storage business since 1915. Birmingham Ice supports its case somewhat better than the other plaintiffs. Its cold storage department operated at a profit in 1955 and 1956 but at a loss in 1957 and 1958. Still, Birmingham Ice was doing well enough to increase the salary of its president from $21,800 in 1956 to $26,000 in 1958; and, in 1957 its president found that he could devote one-fourth of his time to a new business. Birmingham Ice contended that it lost all or part of twenty accounts.

None of the plaintiffs' customers, allegedly lost to a Terminal tenant, was called to tell why he had changed warehouses. Mr. Nelson was not called on to testify.

Southern argues that the plaintiffs operated multi-story structures that were obsolescent;[36] that whatever advan-

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[35] *The figures given represent an increase in gross revenue produced by a substantial expansion of facilities; Shaw actually suffered substantial loss of profits from forced rate and office rent reductions as it will prove in a trial on the issue of damages.* (R. 262, 268-269).

[36] *Birmingham Ice did operate a multi-story structure which had been consistently modernized until the company suffered from the*

tages Terminal tenants enjoyed were because of the efficiency of the facility and not because of any concessions. Representatives of the complainant warehouses attended the first meetings of the group organizing the Terminal." There is evidence that as early as 1954 Mr. Shaw objected, he said, "to the very thought" of the Terminal; that in 1955 the head of Birmingham Ice sought to dissuade Southern from promoting the project on the ground that there was enough cold storage business in Birmingham only for his company and Boggs. A jury might infer that "the Birmingham warehousemen naturally did not relish facing the chill wind of this competition;"[20] that the plaintiffs' losses resulted solely from the construction of the Terminal and not the carrier's unlawful rental practices. Or, the jury might infer that Southern kept its warehouse tenants in business to prey on the plaintiffs' accounts. It is not for us to choose between these inferences. On the record, even assuming that the defendants violated the Act, there is sufficient evidence to support the verdict on the basis that Shaw failed to prove any injury and that none of the plaintiffs successfully carried the burden of proving that the defendants' violations of the Act caused the plaintiffs' business losses.[xv]

B. The district court charged the jury that to sustain the burden of proof the plaintiffs were required to prove that their losses were "the direct result of some wrongful

[20] This is the language of Commissioner Webb, dissenting, in Shaw Warehouse v. Southern Railway Co., 1959, 308 I.C.C. 609, 640.

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impact of the railroad subsidized competition complained of (R. 389), *but Boggs Company and Shaw Company operated almost new one-story modern structures built with funds borrowed at market rates under market loans with market requirements of repayment* (R. 174-175, 263-265).

[xx] *See Counsels' note j, supra.*

[xv] *See Counsels' note d, supra.*

act of the defendant"; that the concessions must have been "the direct cause of some injury to the plaintiffs." This, they say, placed a higher burden of proof on the plaintiffs than the statute required. As they see it, they are entitled to all damages, direct, indirect, or consequential, flowing from unlawful railroad practices.

The Act uses the language "damages in consequence of any such violation." 49 USCA §8. In Pittwood, the Commission held for the carrier, stating that the warehouseman's damages "were not the direct and proximate consequences . . . ." In Terminal Warehouse Co., 31 F.2d 951 the court noted that in the I.C.C. proceeding (finally approved in Merchants Warehouse Co., 203 U.S. 501, 506) the Commission refused an award of reparation, stating that the loss was not attributable directly to the alleged unlawful practices. In *Pennsylvania RR. v. International Mining Co.*, 1913, 230 U.S. 184, 33 S.Ct. 893, 57 L.Ed. 1446, the Court said that the right to recover is "limited to the pecuniary loss suffered and proved"; in *Keogh v. Chicago & N.W. Ry.*, 1922, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183, the Court, referring to the damages recoverable under [777] Section 8 of the Commerce Act, pointed out that "these damages must be proved by facts from which their existence is logically and legally inferrable"; and in *Story Parchment Co. v. Peterson Parchment Paper Co.*, 1921, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544, the Court held that "it was open to the jury to find that the price cutting and the resulting lower prices were *directly* attributable to the unlawful combination."

The trial below was on the issue of liability only. The plaintiffs were spared the necessity of proving specific pecuniary loss and distinguished between what

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[vv] *See Counsels' noted supra.*

was a direct loss and what was an indirect loss. The trial judge instructed the jury it was not to burden itself with "how much damage or injury was sustained by each plaintiff, but only as to whether the evidence satisfies your mind that at least some injury or damage resulted to each plaintiff as a result of a violation" of the Act. This instruction is broad enough for the jury to find that the injury was in market losses of customers and profits. We think that the statutory clause, "damages in consequence of any such violations" means damages that are "the direct result" of such violations. But considering the charges as a whole, the trial court made it plain to the jury that the plaintiffs need show only that "some injury or damage resulted" from the defendants' violations of the Act. This was as favorable an instruction as the plaintiffs could expect.

VI.

Appellants complain bitterly that the trial court permitted Southern's attorneys to engage in improper arguments, addressed to class hatred, that reached "the very nadir of irradicable prejudice". They say that throughout the trial opposing counsel misled the jury by picturing the railroad as the friend and champion of the poor against the warehousemen, pictured as rich and powerful exploiters of the defenseless. This, we may assume, must have taken a little doing—and, an unusual jury. Appellants particularly object to the argument to the jury that the president of the Birmingham Ice and Cold Storage Company was as callous of poor struggling housewives as was Marie Antoinette. Southern's counsel equated testimony that warehouse prices affected food prices "[a] penny a pound" with the well known eighteenth century remark, "let them eat cake". Aside from the error of counsel in attributing the remark to Marie

Antoinette, a common mistake,[21] there was no other error. At least, there was no reversible error. The trial below was a long hard-fought battle in one of a number of wars between the parties. The record reads as if the case were an anti-trust suit. Able counsel for both sides relied on a sort of economic argumentum ad misericordium. We do not endorse this argument nor the allusion to Marie Antoinette. However, the latitude allowed lawyers in cross-examination and in argument to a jury, and the conduct of a trial generally, must rest in the sound discretion of the trial judge. The district judge was scrupulously fair. We find no impropriety the trial judge inferentially approved, in abuse of his judicial discretion. Even considering the total effect of all the allegedly improper statements, we find no impropriety of such proportions as to require reversal and remand of the case.

Judgment is Affirmed.

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[21] Evans, Spoor of Spooks 63 (1954); Stevenson, Book of Proverbs, Maxims, and Familiar Phrases 274(5) (1948).

APPENDIX C.

ON PETITION FOR REHEARING.

No. 18138

SHAW WAREHOUSE COMPANY, ET AL.,

versus

SOUTHERN RAILWAY COMPANY, ET AL.

United States Court of Appeals for the Fifth Circuit.

(September 29, 1961)

294 F.2d 850

[851]

Before Hutcheson, Brown and Wisdom, Circuit Judges.*

Wisdom, Circuit Judge: The Court has considered carefully the appellants' application for a rehearing.

I.

The appellant warehouse companies argue that there is a direct conflict in statutory construction between this Court's opinion in the instant case, 288 F. 2d 759, and the opinion of the three-judge court in Southern Railway Co. v. United States, 186 F. Supp. 29. The latter decision affirmed the ruling of the Interstate Commerce Commission that Southern's rental practices at the Birmingham Food Ter-

* Footnotes in Italics are those of counsel.

minal were unlawful under Sections 2, 3 (1) and 6 (7) of the Commerce Act. While the Commission's decision was not reached until after the trial below, both the Commission's decision and the appeal taken by Southern became final before this appeal was decided. Appellants contend that the three-judge court, speaking through Judge Seybourn Lynne, decided the major issues in this appeal and that this Court's decision creates irreconcilable conflicts in the law applicable to the Birmingham Food Terminal.

The Commission stated in its opinion in *Shaw Warehouse Co. v. Southern Railway Co.*, 308 I. C. C. 602, 611 (1959): "The Commission is the guardian of the general public interest, and proceedings before it are not in the nature of private litigation, but are matters of public concern in which the whole body of shippers and carriers is interested." In the three-judge case Southern Railway contended that the judgments entered in the instant suit, then pending on appeal, were *res judicata* of the Commission's order. Judge Lynne, for the court, held: "[R]egardless of the outcome of such appeals, the appropriate conditions for application of the doctrine of *res judicata*, are not present. The parties are not even the same.[a] The success or failure of private litigation cannot have the effect to bar or stay the power of the Comission to act in a public proceeding such as that before the Commission under the Shaw Company complaint. See Land v. Dollar, 1947, 330 U. S. 731, 67 S. Ct. 1009, 91 L. Ed. 1209." *South-*

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[a] *In the cases below by Shaw Company and Birmingham Ice all parties in the suits below were also parties before the Commission and before the Three-Judge Court. Furthermore, after the Commission decision was made "every other shipper similarly situated was entitled by appropriate proceedings before the Commission or the courts to obtain the benefit of that general finding or order."* A. J. Phillips Co. v. Grand Trunk W. R. Co., 236 U. S. 662, 668 (1915). *See* National Pole v. Chicago & N. W. R. Co., 211 Fed. 65 (7th Cir., 1914); Mitchell Coal & L. Co. v. Pa. R. Co., 230 U. S. 247, 257-258 (1913). *Cf.* Terminal Warehouse Co. v. Pennsylvania R. Co., 297 U. S. 500, 508 (1936).

ern Railway Company v. United States, 1960, 186 F. Supp. 29, 41.[3]

Judge Lynne was thoroughly familiar with the litigation and any possible conflicts. He was the district judge who presided at the trial of this case below. At that time he had the full benefit of the Commission's lengthy opinion.[4] Proceedings before a public agency and proceedings in a private suit for damages are different in objectives, breadth of approach, and issues. Not the construction of the Commerce Act but the application of the Act is different.[5] Once over the hurdle of the motions to dismiss, this case was a factual one for the jury to decide. The jury had before it considerable evidence not contained in record of the Commission's proceedings. And, the important questions of causation and injury, which may have been crucial **[852]** in the minds of the jurors, were not present in the I. C. C. proceedings.

Shaw Warehouse Company initiated the proceeding before the Commission; Boggs Cold Storage Company and Birmingham Ice and Cold Storage Company intervened. Under the Act, the warehouse companies could seek damages and other relief from the Commission. Instead, they elected to sue for damages in the district court. The jury

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[3] *Judge Lynne's opinion continued:*

Furthermore, although such judgments were entered in June, 1950, over six months prior to the Commission's decision and order, no claim of res judicata was made before the Commission and none was included in plaintiff's petition for reconsideration filed in November, 1950. Since the issue was not presented to the agency, it cannot properly be raised in this proceeding. United States v. L. A. Tucker Truck Lines, 1952, 344 U.S. 33, 73 S.Ct. 67, 97 L.Ed. 54.

[4] *The trial below was held in May 1950. The Commission's decision was handed down October 6, 1950.*

[5] *Petitioners believe that the policy of uniform construction of the Commerce Act applies as much in a suit for damages as it does in any other proceeding designed to enforce the Commerce Act.*

held against them in that forum. We are still unimpressed with the argument that we should reverse the verdict in the forum below on the strength of a finding in a different kind of proceeding in another forum.

In the original briefs appellants argued, that "the regulatory agency decision should be given special weight in these appeals." At that time the three-judge case had not been decided. We have given "great weight" to the opinions of the Commission and Judge Lynne. Still we must decide this case on the record before us and in the light of the law as we read it.

II.

Judge Lynne, the hero of appellants first argument, is, along with this Court, the villain of their second argument: that the trial judge erred in allowing counsel for the Southern Railway to engage in prejudicial remarks and cross-examination allegedly picturing Southern Railway as the friend and champion of the poor and defenseless against the warehouse companies, rich and powerful exploiters of the less fortunate. This argument, originally made with some moderation on behalf of all the appellants in the original hearing, is now urged only by counsel for Shaw Warehouse Company and Boggs Cold Storage Company in a supplemental petition and brief on rehearing.

Another reading of the record confirms our view that Judge Lynne did not abuse his discretion as a trial judge in controlling the attorneys' argument and cross-examination. Judge Lynne is an able, experienced district judge whose record is beyond criticism. After the trial below, when he attempted to recuse himself from serving on the three-judge court, by agreement of all of the parties he consented to serve.

As stated in our original opinion, we do not endorse improper arguments such as the allusions to Marie Antoinette,

but we find no reversible error. It is hard to say which litigant is the pot and whence it started calling the kettle black. Southern says, for example, that counsel for Boggs and Birmingham Cold Storage was the first to make the housewife an issue. Considering the length of the trial and the intensity of the feelings engendered by the trial and events preceding it, we think that the lapses were relatively few; their probable effect must be weighed against the total effect of the case on the jury. The record as a whole reflects great credit on the ability and judgment of the district court in keeping the lawyers within the bounds of propriety.

III.

The application for rehearing raises points of law the Court considered in the writing of the original opinion. One of these points, however, should be clarified.

Appellants contend that the Court makes a warehouseman's status as a shipper an issue of fact when it is an issue of law. Appellants over-simplify the question in stating it in terms of a warehouse company being a "person" within the meaning of Sections 2, 3 (1) and 6 (7) of the Commerce Act and of a warehouseman being a "shipper" as a matter of law. As pointed out in the opinion, there is no doubt that warehouse companies are persons within the Act and that they have standing before the Commission as shippers. What they must prove in an action to recover damages is a different matter. The Commerce Act has reached the ripe old age of seventy-five years. During that time there has been only one action for damages comparable to the instant case. [853] *Pittwood v. Northern Pacific Ry. Co.*, 1918, 51 I. C. C. 535. In Pittwood the Commission held: "A warehouse owner, a landlord seeking to rent his property, as such, has no relation with a common carrier which could result in a discrimination against him

in violation of the Act to regulate commerce.' The discrimination there forbidden is in respect of transportation."

We said in our opinion that Pittwood might be distinguished on the ground: "In Pittwood the injury was to a landowner whose real estate investment depreciated in value; the injury was not the result of discrimination with relation to transportation." Judge Lynne made the same distinction in *Southern Railway v. United States*, 1960, 186 F. Supp. 29, 42, indicating thereby that he too considered that not every warehouseman must be treated as a shipper. The discrimination must relate to transportation. Here, if the evidence had shown beyond a reasonable doubt that the appellants were in fact complaining only because the advent of a competitor had produced a decline in rental value of warehousing property in downtown Birmingham, and not because of a discrimination relating to transportation, we would have held that the court erred in not directing a verdict for Southern.

The trial judge did not present this issue to the jury, perhaps because, as appellants suggest, he considered that the matter was settled as one of law. We consider the question essentially a factual one or a mixed question of fact and law. In any event, the trial judge properly overruled appellee's motions to dismiss and for a directed verdict and appellants have no cause for complaint.

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* At 186 F. Supp. 29, 42 the following statement was made with respect to the Pittwood and Fireproof Storage Co. cases:

"The holding in these cases was that the mere owner of property capable of being used as a warehouse on a railroad had no standing to complain of railroad rental practices affecting the value of his property. Neither case was appealed and the result reached in each of them may be inconsistent with the Supreme Court's apparent holding in Barringer v. United States, 1943, 319 U.S. 1, 13, 63 S. Ct. 987, 87 L. Ed. 1171, that the protection of Section 3(1) of the Act extends to every person affected by violations of its prohibitions regardless of his relationship to transportation."

We have considered all of the other points raised in the briefs on rehearing. We find it unnecessary to discuss these points. The petition for rehearing is

Denied.

Brown, Circuit Judge, Dissenting:

The Petition for Rehearing and more mature reflection convince me that our prior decision was wrong. I must therefore dissent from a refusal to reverse this judgment.

I do it on the fundamental basis that two courts, both within this Circuit, and, as it now turns out, composed of a like number of Circuit Judges of this Circuit,[1] have reached diametrically opposite results on several identical, critical issues.

Of course I am not so naive as to think, or even hope that, in today's multi-partied, multi-state, multi-form litigation there must always be symmetry and uniformity. But this is no railroad crossing accident case in which each of three injured passengers, each with his own separate suit, must take the risk that as many different juries will reach a like number of results and which, all the while, leaves the railroad in bewilderment as to just what it would have taken to satisfy the plaintiffs and the juries in how the train ought to have been run.

Here we have one railroad. We have one cold storage terminal. We have one group of competitor complainants. We have one undisputed lease arrangement evidenced by one set of writings between railroad and tenants. We have one rental basis producing one rental figure. We

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[1] The 3-Judge Court, affirming the ICC Order, was composed of Circuit Judge TUTTLE and RIVES and District Judge LYNNE. Southern Railway Company v. United States, N. D. Ala., 1960, 186 F. Supp. 20. In views of my dissent, my Brothers HUTCHESON and WISDOM likewise number two.

have the identical nonpayment of rent by the tenants and identical inaction by the railroad in the effective collection of rent or eviction of delinquent tenants. More than that, we have a single statutory policy condemning any type or kind of discriminatory rebate or favoritism by a railroad.

Yet this single railroad is authoritatively told by two parallel tribunals that this single lease is (1) illegal and must be terminated because (a) the rental [854] basis is inadequate and (b) the rents have not been diligently collected; but also that (2) a jury is entitled to determine whether (a) the rental basis is inadequate or (b) rents have been diligently collected.

No one but a lawyer, or lawyer-turned judge, could begin to understand how this could be. And, I submit, it is even too much for the legal mind which has, to be sure, been affected by its preoccupying fetish with the ram-of-the-mill notion of every suit as a "separate controversy." When dealing with such matters of transcendent public importance as this one case in two forums presents, this approach is a luxury which we can ill afford. That it poses some troublesome conceptual phases and cannot, for example, be readily disposed of on traditional notions of res judicata, collateral estoppel, or the like,[2] does not justify either the result or the despair that, bad as the result is, there is nothing that can be done about it so long as we follow a system that each case stands on its own—not only stands on its own but ends in divergent results since each tribunal must determine for itself what is the law and what it is that the law compels.

[2] The 3-judge case, decided while the appeal was pending undetermined by us, rejected the Railroad's contention that its jury verdict victory in the damage suit was res judicata as to the ICC order. 186 F. Supp. 41.

We returned the compliment when we rejected a similar contention by the damage suit plaintiffs that affirmance of the ICC order was a binding declaration of illegal practices by the Railroad. 288 F. 2d 761, note 5.

Before briefly pointing out some of these specific but critical divergencies, I should make clear that I accept the proposition that the suit for damages is different from the administrative ICC proceeding. It is different precisely in that the plaintiffs have a right of recovery only for *damage* sustained by reason of violations of §§ 2, 3 (1) and 6(7) of the Interstate Commerce Act, 49 USCA §§ 2, 3(1), 6(7). But this single factor does not, as the Court repeatedly emphasizes, purge the trial of its errors or those which we compound of our own.[3] This is so because this case was submitted on a general verdict which left the precise basis for jury action as an "enigma wrapped in a mystery." Had the trial court, as we have many times suggested in these complex situations,[4] resorted to a general charge with special interrogatories under F.R. Civ.P. 49 (b), all of this would have been sufficiently exposed. Had that been done we could then have measured whether any assumed specific answer to the damage issue[5] or to the

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[3] For example, the Court, rejecting res judicata, in note 5 states:

"• • • The issues of causation and injury present in this case were not present in the I. C. C. proceedings. • • • The jury may have found that Southern violated the Act, but that the violations caused no injury to the defendants. There is no necessary inconsistency, therefore, between the jury's finding and the Commission's finding. • • •" 288 F. 2d 761-2.

Then, wiping out all theretofore stated, the Court disposes of the whole case on the damage issue. "Even assuming that the defendants violated the Act, the record supports the verdict on the basis that Shaw failed to prove any injury and that none of the plaintiffs successfully carried the burden of proving that the defendants' violations of the Act caused the plaintiffs' business losses." 288 F. 2d 776.

[4] Vickers v. Tumey, 5 Cir., 1961, 290 F. 2d 426, 432 n. 4, 435 n. 9; Travelers Ins. Co. v. Busy Electric Co., 5 Cir., 1961, ... F. 2d ... [No. 18778, July 17, 1961]; Warren Petroleum Co. v. Thomasson, 5 Cir., 1950, 268 F. 2d 5, 9 n. 3; Clegg v. Hardware Mutual Casualty Co., 5 Cir., 1959, 264 F. 2d 152.

[5] Since the Court finally falls back to this as the positive assurance of correctness of its decision of affirmance, I think it appro-

other two issues [855] was supportable in the evidence or erroneous in the instruction.

But as it was, the jury returned simply a general verdict for the Railroad. Whether it was on the basis of no damage, or on the basis of adequate rental, or diligent collection no one now or ever will know. But because it is all enveloped in this sometime desirable juridical fog, the rule of law is that, if an important jury charge turns out to have been erroneous (and properly excepted to), the whole verdict is infected and falls. The law, unable ever to solve the riddle in fact, has to assume that it was the erroneous charge which induced the verdict. Consequently, if the Court's charge erroneously submitted either one or both of the issues of (a) adequacy of the rental base or (b) diligence of collection of rent, the verdict may not stand notwithstanding the issue of damages.*

This brings me then briefly to some of the divergencies. In dealing with them I need not undertake to elucidate on which of the two answers is correct. Only one is right. Both may not possibly be the law simultaneously. And yet, so far, they are.

The rental basis was attacked as inadequate on several grounds, three of which were substantial: (1) it did not include depreciation, (2) it did not include substantial

priate to point out as a collateral recantation that this business of damages was handled in a strange way. By pretrial order the question of the *amount* of damages was expressly excluded from the trial. How careful, but conscientious counsel were to comply with this order and yet at the same time carry the burden of showing in a monetary way that, in the words of the judge's jury charge, "* * * at least some injury or damage resulted to each plaintiff as a result of a violation of the Act," 288 F. 2d 777, has never been made clear to me.

* Of course the matter would be different were the Court to determine as a matter of law that damages were not shown. We declined to do this and held it was for the jury. 288 F. 2d 770.

costs for specific items,[7] and (3), the use of 8% rather than 10% as the factor on the cost of improvements.

The Railroad contended that depreciation should not be included in the cost base because, under the "Round Robin Agreement," if and when it could legally be done, the Railroad and tenants were bound to carry out the initial agreement by which the tenants were to purchase the property. It is undisputed that the Railroad "* * * did not work depreciation into the rents * * * because the original agreement * * * was that the property * * * would be purchased at undepreciated cost, the rentals paid in the interim *not* to be credited to the purchase price." 288 F.2d 771. It is also undisputed that this item, in terms of money was of substantial significance either as a factor in determining the rate of return (8% or 10%) or as an item in the cost base to which either rate would be applied.

What did the Interstate Commerce Commission—the principal guardian of the public interest in effectuating the lofty aims of the Transportation Act of 1940, 49 USCA § 1 et seq., do with this contention of the Railroad? This was flatly rejected by the Commission. And this was expressly affirmed by the 3-Judge Court. After conceding a certain logical plausibility to the argument were the landlord one other than a common carrier leasing a "freight producing facility," the Court condemned it outright:

> "However, such a rental formula would be the equivalent of an agreement by the railroad to postpone part of the rent to a future date resulting in an unlawful loan or extension of credit similar to the

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[7] These aggregated, on plaintiff's contentions, over $952,000. The items were tabulated in note 9 of the Court's opinion, 288 F. 2d 765. The three items of Grading Tracks and Interest Cost total over $800,000.

The 3-Judge Court dealt with this at 186 F. Supp. 36, and notes 4 and 5.

extension of credit on delayed rent collections, condemned by the Commission. * * * [citing cases]." 186 F. Supp. 38.

The 3-Judge Court then proceeded to point out that the so-called repurchase agreement—asserted as an excuse for exclusion of a depreciation factor—required the tenants "* * * to purchase only under the financing plan whereby Southern's property and credit are substituted for that of the tenants to obtain the purchase funds:" 186 F. Supp. 38. The Court continued: "This financing plan, with its otherwise unsecured second mortgage, and its first mortgage which is fortified by the additional security of Southern's full guarantee of the obligations of Terminal Corporation and the separate obligations of each tenant, is merely a more complex form of credit extension such as those condemned in Vandalia R. Co., supra; Hocking Valley R. Co., supra; and Propriety of Operating Practices—New York Warehousing, supra * * *." 186 F. Supp. 38.

In short, the ICC and the 3-Judge Court held categorically that notwithstanding the potential purchase of the properties by the tenants at an undepreciated figure at an uncertain time in the future, depreciation had to be taken into account because, even on that assumption, it was an unlawful extension of the Railroad's credit for that period of time.

And what did we do to that standard? By affirming the trial judge's charge that the jury need not consider depreciation if it found that Southern and the tenants intended at all times to revert to the original purchase-sales plan, this Court rejected outright the standard of conduct exacted by the ICC. What the Court described as the "plaintiff's theory"[8] was actually a paraphrase of the words

[8] This Court's opinion states:

"The plaintiff's theory is that the charge was erroneous, even if eventually the property would be purchased at the

of the 3 Judge Court quoted above. In rejecting the plaintiff's theory, we rejected the legal standard adopted by the Commission and affirmed by the 3-Judge Court.

As to this contention of the plaintiffs and the flat holding of the ICC and the 3-Judge Court, we merely acknowledged that the "argument carries a little aroma of plausibility." We then rejected it out of hand since it would "* * * allow Southern to recover the depreciation twice, once in the sale and a second time by including the element of depreciation in computing the cost-base for rentals." 288 F. 2d 772.

The same thing happened as to the exclusion of specific substantial items in the cost base. See note 7, supra. The ICC and the 3-Judge Court held that some of these identical items had not been included adequately in the cost base.[9] The 3-Judge Court made it very plain:

> "The cost base employed by Southern did not include all of the costs of construction. * * * The Commission found that land under spur tracks and in areas where its utilization is otherwise essential to the occupancy of the tenants was wrongfully excluded from the cost base. It likewise found that substantial costs for grading, construction of spur tracks, and promotion and engineering expenses were improperly excluded. Southern used 8 percent as the rental factor on construction costs rather than the 10 percent factor under the prevailing market rental practice." 186 F. Supp. 36.

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undepreciated cost, because the rent would result in the indirect loan, without interest, of the depreciation—until the sale occurred. As a result, they argue, the carrier unlawfully furnished working capital to the tenants." 288 F. 2d 772.

[9] The intrinsic merits of each item has been carefully considered by the ICC. See notes 4 and 5, 186 F. Supp. 36 which indicate some of the items on which the ICC agreed with the Railroad.

The 3-Judge Court then characterized this matter in terms which epitomized a century's history: These "* * * railroad rental practices condemned by the Commission are not novel. They are but variations of practices which have been uniformly condemned by the Commission and the courts * * *." 186 F. Supp. 36. It was in such sweeping words that the 3-Judge Court affirmed the ICC order which ordered the Railroad to "cease and desist * * * and thereafter [857] * * * abstain from the unlawful rental practices * * *"[10] and required the Railroad to file record proof of its compliance.

Bearing in mind that there was but one terminal facility constructed and these items of disputed cost were identical in both proceedings, what rule of law did this Court lay down? Whereas the ICC held that the leases could no longer subsist and that the Railroad would have to take affirmative action to terminate them, we held that it was for the jury to say whether the leases were or were not valid because these items were or were not properly included in the cost base. The strong public policy effectuated by the ICC order was left to the jury of untrained persons to determine both fact and the relative importance of legal factors. We said in the broadest terms:

> "In final analysis the propriety of Southern's including these items in fixing rentals and the weight to be attached to any one or more of these items were questions for the jury." 288 F. 2d 773.

Moreover, as to both of the elements of (a) depreciation and (b) exclusion of specific items, there was a further decisive divergence. It assumes central importance since, as to both, this Court left it to the jury to make the determination. The standard of measuring adequacy of the rent was succinctly declared by us:

[10] See note 1, 186 F. Supp. 32.

> "We consider that fair rental value, that is, 'fair market rent', rather than a compensatory return is the proper standard, at least in this type of action, because the suit rests on a claim for damages caused by destructive competition." 288 F. 2d 772.

By rejecting the requirement that the rental produce a "compensatory return," we then held that considering general real estate conditions in Birmingham "the jury could have concluded that the plaintiffs failed to show that it was economically feasible for Southern * * * to obtain tenants willing to pay rent that would yield ten per cent on warehouse buildings * * *." 288 F. 2d 772.

Contrast this with the standard set by the ICC and declared by the 3-Judge Court in these emphatic terms:

> "Emerging from these cases is the clear rule that rents railroads charge for facilities leased for the purpose of attracting freight must be no less than the prevailing market rents in the area,[11] and no less than compensatory, including the normal return on capital employed in like enterprises, whichever is higher. A carrier is prohibited from engaging in such noncarrier business on a more favorable basis than other business because it can offset any losses against carrier revenues. It cannot operate noncarrier business as a means of securing freight business free of the Commerce Act's required standards for carrier conduct." 186 F. Supp. 37.

Where we had held that the "jury could have concluded * * * *" that it was not "economically feasible" for the Railroad to obtain tenants on a rental that would produce a fair return on actual costs, 288 F. 2d 772, the 3-Judge

[11] We had earlier quoted so much of Judge LYNNE'S opinion down to this point. 288 F. 2d 770. The effect was to put altogether the comparative standard of prevailing market rents versus compensatory return, whichever was higher.

Court applied strong words in expressly rejecting the Railroad's contention that the rental should take into account "the depressive effect on Birmingham market rents of the construction of their food terminal facilities." 186 F. Supp. 38.[12] [858]

The divergence is even more graphic as to the element of failure to collect rents.

The tenants were the same in both proceedings. The rent due and payable was identical. The rent paid and unpaid was the same. The principal offender was Thomas N. Nelson & Company. It was over $135,000 in arrears. All tenants were in arrears an aggregate of $335,000. 186 F. Supp. 35; 288 F. 2d 774-75.

The ICC held that this constituted unlawful discrimination and ordered that the Railroad cease and desist. This part of the order was not even attacked in the 3 Judge Court proceeding.[13]

But again, as we had done with these other critical legal standards promulgated by the ICC and affirmed by the 3 Judge Court and as to every related fact finding made by the Commission, we left this to the jury as well:

> "We cannot say, as a matter of law, that the failure to collect rentals was so lacking in diligence that it constituted a violation of the Act. The trial judge properly submitted the question to the jury. Sufficient evidence supports the jury's verdict." 288 F. 2d 775.

My position as to all of this is simple: the law may not say to a railroad that this lease is unlawful and must be

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[12] The Court stated: "* * * we are of the opinion that under the teaching of Baltimore & Ohio R. Co., a railroad cannot justify discharging of lower rents because of the depressive effect upon existing market rentals of its action in constructing facilities rented at a substantially lower rental." 186 F. Supp. [illegible]

[13] See note 2, 186 F. Supp. 33.

discontinued, and at the same time say to the railroad that as to the very same lease, calling for payment of the very same rentals, relating to the very same tenants, a jury may nonetheless determine it to be legal.

This transcends this Court's euphemism of "paradoxical results."[14] It disregards altogether the right to recover damages as a sanction in the effectuation of an important congressional policy forbidding any and all kinds and types of discriminatory practices. Such a result frustrates the effectual enforcement of that policy. It leaves the body charged with the responsibility of a continuing policing of that grand scheme with the power merely to make pious but academic declarations. True, a cease and desist order could be entered but as these two proceedings demonstrate, that is thought to be a matter of little importance to the railroad. By practices condemned outright by the ICC and which it may no longer carry on, it has built a terminal which unlawfully favors the tenants. The deed is done. By this Court's action it is not only permitted to litigate (as it properly should be entitled to) the question of whether such violations cause damage to competitors. It is permitted once again to litigate the underlying question whether those practices were unlawful.

This result would be avoided had the trial court and this Court paid proper heed to the doctrine of primary jurisdiction. *United States v. Western P. R. Co.*, 1956, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed. 2d 126; *Southwestern Sugar and Molasses Co. v. River Terminals Corp.*, 1959, 360 U.S. 411, 79 S.Ct. 1210, 3 L.Ed. 2d 1334, 1959 AMC 1631; *Far East Conference v. United States*, 1952, 342 U.S. 570, 574-5, 72 S.Ct. 492, 96 L.Ed. 576; *Federal Maritime Board v. Isbrandtsen Co.*, 1958, 356 U.S. 481, 498, 78 S.Ct. 851, 2 L.Ed. 2d 926.

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[14] See note 5, 288 F. 2d 764

The nature of the doctrine of primary jurisdiction is discussed at length in the *Western Pacific* case, supra. It, says the Court, "like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." 352 U.S. 59, 63. In contrast to "exhaustion" of remedies which merely is a precedence in point of time, primary jurisdiction "on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the [859] judicial process is suspended pending referral of such issues to the administrative body for its views." 352 U.S. 59 at 64. Of the two factors bearing upon its application, the one which has been "particularly stressed" more recently is "the expert and specialized knowledge of the agencies involved. * * *" 352 U.S. 59, 64. Desirable uniformity and expertness as two factors "are part of the same principle, 'now firmly established, that [1] in cases raising issues of fact not within the conventional experience of judges or [2] cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined * * *." 352 U.S. 59, 64.

Its true nature is demonstrated by the fact that the "doctrine of primary jurisdiction thus does 'more than prescribe the mere procedural timetable of the lawsuit.'" 352 U.S. 59, 65. Thus the fortuitous fact that the jury trial was had prior to the time the 3-Judge Court enforced the [C] order, or the appeal in our Court was argued prior

to the submission of the 3-Judge case but finally determined by the opinion of March 3, 1961 (288 F. 2d 759) after the decision of the 3-Judge Court on July 18, 1960 (186 F. Supp. 29), are all factors of no decisive significance. The basic validity of this whole terminal project was before the Interstate Commerce Commission pursuant to the obligations imposed on it. It was required to and did determine that this project constituted unlawful rebates and favoritism. Once it made this determination concerning this single entire project, it became a binding declaration[15] since primary jurisdiction "is a doctrine allocating the law-making powers over certain aspects of commercial relations." 352 U.S. 59, 65.

The operation of that doctrine here required that the District Court and this Court accept the expert judgment of the Commission concerning the basic legality or illegality of the project.[16] For the operation of the doctrine is that it " 'tranfers from court to agency the power to determine' some of the incidents of such relations." 352 U.S. 59, 65.

I therefore respectfully Dissent.

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[15] This does not mean, of course, that the decision of the administrative agency is not subject to judicial review. On the contrary, the 3-Judge proceeding is the precise means established by Congress to determine whether agency action is acceptable as a matter of law. The consequence of our decision is to set up two reviewing tribunals.

[16] This would, to be sure, leave the question of causation and damages for the court proceeding.

APPENDIX D.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION.

SOUTHERN RAILWAY COMPANY, et al.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,
Defendants.

C. A. 9586

United States District Court,
N. D. Alabama, S. D.
186 F.Supp. 29.

[32] Before Richard T. Rives and Elbert P. Tuttle, Circuit Judges, and Seybourn H. Lynne, District Judge.

Lynne, District Judge. Proceeding under the provisions of 28 U.S.C.A., Sections 1336, 1398, 2284, 2321-2325, 5 U.S.C.A., Section 1009, and 49 U.S.C.A., Section 17(1), plaintiffs Southern Railway Company (Southern), Georgia Industrial Realty Company (Realty Company), a wholly owned subsidiary of Southern, and Birmingham Food Terminal Corporation (Terminal Corporation) brought this action to enjoin or set aside the report and order of the Interstate Commerce Commission, dated October 6, 1959, in the Commission's Docket No. 32241, Shaw Warehouse Company vs. Southern Railway Company et al. The report of the Commission is officially reported at 308 I.C.C. 609.[1]

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[1] The Commission's order, not officially reported, is quoted herewith:

"This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the par-

The order complained of was entered in a proceeding commenced by the filing of the July 25, 1957, complaint of Shaw Warehouse Company (Shaw Company), in which proceeding the Bureau of Inquiry and Compliance of the Commission (Bureau of Inquiry), Birmingham Ice and Cold Storage Company (Birmingham Ice), Harris Transfer Company (Harris Transfer) and Harris Warehouse Company (Harris Warehouse), and the Louisville and Nashville Railroad Company intervened. Shaw Company, Birmingham Ice, Harris Transfer and Harris Warehouse also intervened as defendants herein pursuant to the provisions of 28 U.S.C.A., Section 2323.

In the report and order here under attack, the Commission found that, in their leasing of the facilities known as the Birmingham Food Terminal (Terminal Facilities), Southern and its real estate development subsidiary, Realty Company, have violated the anti-concession prohibition against undue and unreasonable discriminations, prejudices and advantages and against departures from, and the extension of privileges and facilities other than those specified in, the railroads' published tariffs [49 U.S.C.A., § 2, § 3(1), § 3(2) and § 6(7)].

ties, oral argument having been had, and full investigation of the matters and things involved having been made, and the Commission having, of the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof;

"It is ordered, That the defendants named in the complaint, according as they participate, be, and they are hereby, notified and required to cease and desist, on or before December 21, 1959, and thereafter to abstain from the unlawful rental practices, described in the report made a part hereof, in connection with the operation of the Birmingham Food Terminal at Birmingham, Alabama.

"It is further ordered, That said defendants, according as they participate, be, and they are hereby, notified and required to file with this Commission, in affidavit form, a statement of action taken to correct these practices on or before December 21, 1959.

"And it is further ordered, That this order shall continue in force until the further order of the Commission."

Before both Commission and Court plaintiffs have consistently maintained that the Commission had no power to grant the relief requested by Shaw or any of the warehouse intervenors under the foregoing sections of the Interstate Commerce Act. They insist that this is for the reasons that none of the warehouse intervenors is a shipper or [33] receiver of freight; that the railroad does not provide "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions" for the warehouse intervenors and the tenants of Terminal Corporation so as to give rise to a prohibited discrimination under 49 U.S.C.A., Section 2; that without such discrimination there can be no unlawful "preference" prohibited by 49 U.S.C.A., Section 3(1), and that there can be no prohibited rebate within the meaning of 49 U.S.C.A., Section 6(7) without a showing that facilities are provided a shipper on a non-compensatory basis.

Having performed its duty to canvass the whole record of the proceeding before the Commission in obedience to the command of the Administrative Procedure Act (5 U.S.C.A., § 1009), instructed by the teaching of Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 715, the Court, in a desire to compress its discussion of a voluminous and complex record within reasonable limits, will respond to plaintiffs' threshold contentions in the body of this opinion.

On the basis of specific findings that the rentals charged for the use of the railroad's facilities were substantially below those prevailing under established market practices, and that the railroad had followed a practice and pattern of delayed collection thereof, and of extending credit on freight bills beyond the 96 hours allowed by the regulations of the Commission, it issued an order requiring plaintiffs to cease and desist from unlawful rental practices and

to file with the Commission, in affidavit form, a statement of action which they have taken to correct such practices.[2]

The terminal facilities with which we are concerned came into existence as a result of a program initiated by Southern in 1954, designed to promote a produce terminal facility, shortly thereafter expanded into promotion of a fully integrated food wholesale, processing, and warehousing facility. Southern's study of the produce aspects of the project alone showed that if such facilities could be constructed at a location on the lines of Southern outside the reciprocal switching district of Birmingham, so as to assure exclusive rail service by Southern, it could expect to attract new freight revenues from its competitors, ranging up to five hundred thousand dollars per year.

Early in the promotion, Southern's vice president, F. H. Brown, instructed Joseph DeOreo,[3] a professional promoter who had come to Birmingham at Southern's request and who had become affiliated with a local farmers' cooperative, Jefferson County Truck Growers' Association (Truck Growers), to concentrate his efforts on the six largest produce receivers in the area. Brown took the position that if a substantial number of these could be obtained, circumstances and trade influences would force the others to come into the terminal that Southern proposed to build. He stated that holdouts would "have to follow suit or wither on the vine . . . they would have to join the parade or perish."

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[2] The original effective date of the order was December 21, 1959. This was later extended to March 8, 1960, to permit consideration of a motion for reconsideration, and, upon the filing of this action was further extended pending further order of the Commission. Only the findings with respect to rentals are attacked herein; no complaint is made of the Commission's findings with respect to extension of credit, on rents and freight bills.

[3] That DeOreo was no stranger to similar promotion efforts, see Union Pacific R. Co. v. United States, 1941, 313 U. S. 450, 61 S. Ct. 1064, 85 L. Ed. 1453.

The development was facilitated by the incorporation of Terminal Corporation on February 10, 1955, as a non-profit corporation with paid-in capital of only two thousand dollars. This company has occupied no office space or other premises, and has had no employees or paid officials. It was designed as a conduit through which business between **[34]** Southern and occupants of the terminal could be channeled.

As originally conceived the promotion plan contemplated that the necessary land would be conveyed by Realty Company to Terminal Corporation under a 4 percent second mortgage on which interest would be payable annually, but no principal payments would be due during the twenty-five-year life of the mortgage. A construction loan would be obtained in the name of Terminal Corporation, which loan would be secured by a first mortgage on the same land and the facilities to be constructed thereon. The land and improvements, subject to these first and second mortgages, would be leased to Realty Company for twenty-five years at a rental equivalent to the principal and interest payments required under the first mortgage. This lease would then be assigned to the first mortgagor as collateral security. Thereafter, Realty Company would lease the same property back to Terminal Corporation for the same rental period and for substantially the same rent. Facilities constructed on portions of the property for the individual tenant-purchasers would then be sold to such tenant-purchasers, subject to the mortgages and leases described. As a condition of securing the first mortgage loan, an agreement would be executed between Southern and the first mortgagee guaranteeing the performance of all of the obligations assumed by Realty Company under its lease of the property from Terminal Corporation. This guarantee by Southern was designed and intended to permit the tenant-purchasers to purchase their individual

facilities, each independent of the other, without being required to make any down payment on the purchase price and to secure for them the lowest possible interest rate by extending to them the use of Southern's credit with the lending agency. The purchase price itself was to be substantially reduced by reason of the fact that Southern, for itself, was to pay a substantial portion of the costs, and was to retain title to certain portions of the land devoted to the use of the terminal participants. For example, the purchase price would not include any of the substantial costs of grading the property, or any of the value of land devoted to service tracks or a large portion of the land devoted to driveway areas serving the terminal. Nor would it include any of the costs of paving such driveway areas or those portions of driveway areas which crossed service track areas retained by Southern. The purchase price, however, was to include the interest costs of interim financing required during the period of actual construction.

On September 26, 1955, Atlantic Coastline and several other railroads filed a petition with the Interstate Commerce Commission seeking an investigation into the legality of such proposed sales plan. Southern thereupon modified its terminal plan on October 18, 1955, agreeing, through Realty Company, to undertake the construction of the facilities and to lease them to the proposed tenant-purchasers, under separate leases for each, for a period of five years with option in the tenants to renew for an additional five-year period. The separate leases were to be assigned to Realty Company. The lease agreement provided that if the original plan was determined by proper authorities, to the satisfaction of Southern, to be legally sound, both tenants and railroad would be obligated to carry out the sales agreement. In any event, the tenants were given an option to purchase the property at the cost

price provided for in the original plan at any time during the potential ten-year term of the lease. The rental under this lease plan was set at 6 percent per year of the cost base represented by the sales price under the original plan, from which base Southern had agreed to exclude substantial costs. It was agreed that the total rental would be distributed among the tenants on the basis of the square feet occupied by their facilities and by the expansion areas adjacent thereto which most tenants had reserved.

[35] Beginning in June, 1955, prior to the completion of the entire terminal facility, certain of the individual buildings were completed. Some of these were occupied, wholly or partially, as they became available. The earliest of such occupancies was that of a public cold and dry storage warehouse company, Thomas N. Nelson & Company (Nelson Company) on May 15, 1956. Until the entire terminal was declared officially completed on July 31, 1957, monthly rents were negotiated with individual tenants roughly on the basis of the costs expended and included in the rent base under the October, 1955, agreement, and of the portion of the property available for use by the tenants. In virtually all instances there were lags of several months in the billing and collection of these rentals. At the time of the hearing before the Commission on January 21, 1958, Nelson Company had paid rent for a period of only two months of its entire occupancy, and was over $135,000 in arrears. It was charged no rent at all for the period May 15, through July 31, 1956. During the hearing before the Commission on February 27, 1958, Southern instituted an action against Nelson Company and Terminal Corporation for rent in the amount of $135,000 owed by Nelson Company. As of that date, all of the tenants of the Food Terminal were in arrears on their rent since September, 1957, in amounts aggregating, under the rail

road's method of computing rents, over $335,000. The action against Terminal Corporation, however, included no effort to collect this rent and, although the president of Nelson Company had previously testified in the hearing that his company could not pay the rent due, and that during its entire period of occupancy it had never been in a position to pay the rents owed by it at any time, no effort was made by the railroad to evict the tenant.

The discontinuance of payment of rent by other tenants was said to stem from their unwillingness to pay rent in the amounts required under their October, 1955, lease agreement. By withholding rental payments, it appears that in January, 1958, they secured an agreement from the railroad to reduce the rents due under their leases by an aggregate amount of approximately $32,000 annually. This was accomplished through the agreement of Southern to remove from the cost-rental base the sum of $392,816.06 which was required to be allocated under the October agreement to areas set aside for various tenants for future expansion. These costs were reallocated by Southern to these expansion areas and to building areas otherwise set aside for future tenants.

During the hearing before the Commission, several of the tenants testified, however, that they would pay the rents owing if the railroad would only send them a bill. One tenant testified that he had received from the railroad no demand for his rent and that he had stopped payment because he "could not see any point in us paying rent when other people were not paying rent." Several other witnesses testified that there had been no demand for payment but that they were willing to pay rent only if Southern would reduce the cost basis of their rent to a point satisfactory to them. Others testified that they would pay rent only if their right to purchase their building was clarified.

The evidence showed that the prevailing market practice in the Birmingham area for newly constructed commercial facilities, such as those in Southern's terminal, was to require a rental based on 8 percent of the value of land and 10 percent of all construction costs and all other expenses including incidentals, such as architects' fees. However, such rental terms represented a maximum for national concerns with substantial financial standing, with ten to fifteen year term leases, where the buildings were of multi-purpose construction which would enable them easily and readily to be relet in the event of a lease cancellation or financial failure of the tenant. Where the lease is shorter, the financial standing questionable, where significant amounts of special equipment are included in the buildings, such as the refrigerated [36] storage space or smokehouses built into various of Southern's facilities, higher rents or longer term leases generally would be required.

Clearly, there is substantial evidence in the record showing that Southern's rental program, even if enforced to the letter of the October, 1955, agreement, did not measure up to prevailing market rental practices. The cost base employed by Southern did not include all of the costs of construction or all of the value of land.[4] The Commission found that land under spur tracks and in areas where its utilization is otherwise essential to the occupancy of the tenants was wrongfully excluded from the cost base. It likewise found that substantial costs for grading, construction of spur tracks, and promotion and engineering expenses were improperly excluded.[5] Southern

[4] There was considerable evidence opposing the twenty-five hundred dollar per acre valuation of land employed by Southern, but the Commission held that it could not say that such valuation was inadequate. 308 I.C.C. at 620.

[5] The Commission held that Southern should not be required to include the costs of the lead track, certain spur tracks serving the

used 8 percent as the rental factor on construction costs rather than the 10 percent factor under the prevailing market rental practice.

It should be emphasized that this court is not essaying the impermissible role of fact finder. However, in the discharge of its duty to canvass the whole record in arriving at a determination as to whether there is a rational basis for the ultimate conclusions of the Commission, we have deemed it appropriate to discuss facts which are supported by substantial evidence in the record. While the body of evidence opposed to the Commission's findings has been considered, to discuss it would be to prolong this opinion unduly.

The railroad rental practices condemned by the Commission are not novel. They are but variations of practices which have been uniformly condemned by the Commission and the courts under both the Interstate Commerce Act and its cognate statute, the Elkins Act, which, for such purposes have been considered to be in *pari materia*. These statutes, remedial in nature, "are applicable to every method of dealing by a carrier by which the forbidden result could be brought about." New York, N.H. & H.R.Co. vs. Interstate Commerce Commission, 1906, 200 U.S. 361, 26 S.Ct. 272, 277, 50 L.Ed. 515. Because of the indirect forbidden concessions which necessarily result from inadequate rentals for freight-producing facilities, railroads have in the past successfully invalidated their own lease agreements because of such rental arrangements. Cleveland C.C. & S.L.R.Co. vs. Hirsch, 6 Cir. 1913, 204 Fed. 849; Central of Georgia R.Co. vs. Blount, 5 Cir. 1917, 238 Fed. 292. In Leases and Grants by Carriers to Shippers, 73 I.C.C. 671, 683 (1922), the Commission announced

nonshipping truck growers, tracks, which it found conducive to use as team tracks, and the costs of demolishing old buildings and removing old tracks. 308 I.C.C. at 630. These findings were not challenged in this proceeding.

as a general policy to be followed by all railroads that railroad-owned warehouses should not be leased on terms "less favorable than would be obtained under similar conditions and restrictions of use, were the land owned independently of the railroads." And, in Propriety of Operating Practices—Packing Sheds, 246 I.C.C. 273, 280 (1941), the Commission specified that the commerce laws required that "where new facilities are built, 'the total rental should be not less than enough fully to cover a fair return on value plus taxes, insurance, depreciation and maintenance, and no such new construction should be undertaken unless there is assurance, with all reasonable certainty, that such rental can and will be collected.'"

Such railroad rental programs have been considered on two occasions by the Supreme Court. In Baltimore and Ohio R.Co. vs. United States, 1939, 305 U.S. 507, 59 S.Ct. 284, 83 L.Ed. 318, the **[37]** Court sustained an order of the Commission requiring various railroads operating and leasing warehouses in the New York City area to charge no less than fully compensatory rents. Such rents were ordered even though it appeared that rents thus required would be higher than prevailing market rents because the railroads had constructed so much more dry and cold storage warehouse space than was needed in the area that they had depressed the normal rates and rentals. The District Court had observed (20 F.Supp. 273, 278). "It is no answer to the violations of the statute to say that as the railroad has a losing piece of property on its hands which it acquired in good faith it should be permitted to rent it for its fair rental value. That is true only provided so doing does not violate the law. While it may lawfully minimize its losses from bad investments, it may not give concessions to a favored shipper." While the Supreme Court noted that where freight is not an object, and competitive practices are absent, reasonable

or market value might be the proper test of such rents, it was clear in its conclusion that rents should not be less than compensatory where facilities were furnished for the purpose of securing freight. The Court observed:

> ". . . It is immaterial that the shipper pays fair value or the market price for the extra privilege he enjoys. Section 6(7) of the Act forbids the carrier to receive less than the published rates for transportation or to remit 'by any device any portion of the rates'. When services, not necessary for transportation, are furnished below cost in an effort to acquire rail transportation, as was done here, this provision is violated. Since the carrier warehouse rates, as found by the Court and Commission, are not open to all shippers alike there is a violation of §§ 2 and 3 (1) prohibiting discrimination and unreasonable prejudice. The rail transportation rates have charged against them the loss occasioned by warehousing practices designed to attract a volume of rail business" (305 U.S. at pages 523-524, 59 S.Ct. at page 290).

Emerging from these cases is the clear rule that rents railroads charge for facilities leased for the purpose of attracting freight must be no less than the prevailing market rents in the area, and no less than compensatory, including the normal return on capital employed in like enterprises, whichever is higher. A carrier is prohibited from engaging in such noncarrier business on a more favorable basis than other business because it can offset any losses against carrier revenues. It cannot operate noncarrier business as a means of securing freight business free of the Commerce Act's required standards for carrier conduct.

The language in the Supreme Court opinion in Union Pacific R.Co. vs. United States, 1941, 313 U.S. 450, at page

464, 61 S.Ct. 1064, 1076, 85 L.Ed. 1453, that rents there need not be compensatory is not inconsistent with this rule. There the railroad and the city of Kansas City, Kansas, jointly promoted a food terminal. The city provided the land and the Public Works Administration, a federal agency, furnished about 45 percent of the construction funds. Except for the participation of the railroad there would have been no commerce law restrictions on rental levels. But because of the railroad's participation it was held that rents must be no less than "fair rental value", even though such rent might not be compensatory on the investment of all of the joint participants in the financing. The Court prescribed a series of tests to be applied in determining the rents to be charged by the city under these circumstances. These were: (1) going rates for similar facilities in the community; (2) rents prospective tenants are willing to pay; (3) over-all cost and over-all value of the properties; (4) cost of furnishing the facilities, including the normal return on capital employed in like enterprises, and (5) **[38]** other pertinent factors which might emerge. Under Baltimore & Ohio, it was recognized that the Commission had the power "whenever it is of the opinion that any practice is unjust, unreasonable, preferential or otherwise violative of the Act, to prescribe what practice will be just, fair and reasonable." In this case the Commission found that the Union Pacific standards "may well be applied in this proceeding." In doing so, it found that "the basis upon which the assailed rents were constructed was and is unduly low by comparative standards, as is also the defendant carrier's return on its investment." It justifiably concluded that "little value can here be attached to the factor of the rentals that the tenants are willing to pay, for as shown, some of the tenants appear dissatisfied in varying degrees with the low rentals they are now paying." It found that the rents did not reflect over-all costs

and over-all value and were substantially below the prevailing practice which, after considering costs of furnishing the facilities, must provide the normal return on capital employed in like enterprises. Thus, the Commission logically concluded that even the special tests of Union Pacific were not met by Southern's practices.

Plaintiffs suggest that the Commission did not, as it should have, consider as "other pertinent factors" under Union Pacific tests: (1) the provision for purchase under the October, 1955, lease agreement; (2) alleged informal approval by the Commission of its 8 percent rent formula, and (3) the depressive effect on Birmingham market rents of the construction of their food-terminal facilities. The record demonstrates that all of these factors were considered and rejected by the Commission.

As to the first of these proposed factors, Southern insists that in fixing its rental charges it was not required to take into account depreciation costs because, it contends, the tenants are obligated by the October, 1955, lease agreement to purchase the facilities at undepreciated cost. If this were true, and if the landlord was not a railroad leasing freight producing facility, there would be some logic in this position since its 8 percent rent would treat all of the costs as being subject to depreciation in the same manner as the prevailing market rental practice treats land. However, such a rental formula would be the equivalent of an agreement by the railroad to postpone part of the rent to a future date, resulting in an unlawful loan or extension of credit similar to the extension of credit on delayed rent collections condemned by the Commission. See Vandalia R. Co. v. United States, 7 Cir. 1915, 226 Fed. 713; United States v. Hocking Valley R. Co. D.C.N.D. Ohio, 1911, 194 Fed. 234, affirmed 6 Cir., 1914, 210 Fed. 735, certiorari denied 1914, 234 U.S. 757, 34 S.Ct. 675, 58 L.Ed. 1579; Propriety of Operating Practices

—New York Warehousing, 216 I.C.C. 291 (1936), affirmed 220 I.C.C. 102 (1937) sustained; Baltimore & Ohio R. Co. v. United States, D.C.D.Md., 1938, 20 F.Supp. 273, affirmed 1939, 305 U.S. 507, 59 S.Ct. 284, 83 L.Ed. 318.

Assuming, *arguendo*, that such agreement is enforceable as a matter of law, practical obstacles such as the low capitalization of Terminal Corporation and the insolvency of Nelson Company abound in the record. Moreover, the tenants can be required to purchase only under the financing plan whereby Southern's property and credit are substituted for that of the tenants to obtain the purchase funds. This financing plan, with its otherwise unsecured second mortgage, and its first mortgage which is fortified by the additional security of Southern's full guarantee of the obligations of Terminal Corporation and the separate obligations of each tenant, is merely a more complex form of credit extension such as those condemned in Vandalia R. Co., *supra*; Hocking Valley R. Co., *supra*; and, Propriety of Operating Practices—New York Warehousing, *supra*. Cf. Section 20(a) of the Interstate Commerce Act [49 U.S.C.A., 20(a)]; Texas and R.R.Co.—Assumption of Obligation, 271 I.C.C. 230 (1948); Lehigh [39] Valley R.R.Co.—Conditional Sales Contract, 223 I.C.C. 329 (1939). The Commission did not pass upon the validity of the sale plan; consequently, it is not before this court on review. However, in view of the fact that the cost-price under the sales plan excludes the very cost which the Commission held could not be lawfully excluded from the rent base, we fail to see how Southern can here complain of the action of the Commission in adopting a rental plan which requires the application of a higher rental factor to depreciable items of cost.

Southern further contends that the Commission should have sustained its 8 percent rent formula because of certain informal communications with Commission personnel.

Following the filing of the Atlantic Coastline R.Company petition for investigation in September, 1955, the Commission ordered the Bureau of Inquiry to investigate Southern's proposed food terminals at Birmingham and other cities along its lines to determine whether criminal prosecutions under the Elkins Act in one or more cities were indicated. In November, 1955, Southern wrote a letter to the Commission's chief examiner stating that until its sale plan was determined to be legal, it had adopted a rental plan in Birmingham. Under such plan Southern represented that the rents would be based on 8 percent of *full costs*. In May, 1956, the attorney for Terminal Corporation had an *ex parte* conference with a member of the Commission wherein the attorney states, in affidavits attached to the petition for reconsideration filed with the Commission, that he was given oral assurances that Southern's 8 percent rental program had the Commission's approval. On May 3, 1956, the Director of the Bureau wrote a letter to a member of the Congress stating that the Bureau's Birmingham investigation had been completed and on the basis of its report the Commission had decided not to recommend prosecution. Such letter stated, "The Bureau's investigation disclosed that under its present plan, the Southern Railway is constructing the terminal at its own expense, retaining ownership thereof, and will lease at an annual rental equivalent to 8 percent of the value of the land and the cost of construction of the buildings and all expenditures in connection therewith. Upon the facts disclosed, the Commission did not find that the rental would be inadequate."

Complaining that the Commission erred in refusing to admit evidence of these informal advices, Southern is here insisting that they constituted at least some evidence of proper rents in Birmingham. We do not agree. The Commission did consider the letter of May 3, 1956. It found, "this was an informal opinion of the indicated

official based on an informal investigation made prior to the construction of the terminal and hence without the benefit of the actual costs later incurred thereon. Thus it clearly had no evidentiary value and was properly rejected." Such letter indicated no more than an opinion that there would be no criminal prosecution. It did not represent or purport to constitute an approval by the Commission. It was neither the equivalent of a declaratory order issued by the Commission after public hearings under Section 5 (d), The Administrative Procedure Act [5 U.S.C.A., § 1004(d)], nor an order of the Commission under Section 20(a) of the Interstate Commerce Act upon an application for Commission approval of financing arrangements.

A fortiori, the Commission properly disregarded evidence of informal oral advice given to the attorney for Terminal Corporation. The rights of parties, including intervenors, to the proceeding then pending before the Commission involving the legality of the rental arrangements would have been unduly prejudiced in their claims to the protection of the Commerce Act by the reception of evidence pertaining to oral *ex parte* assurances.

With respect to the contention that the Commission did not consider the possibility of a depressive effect on Birmingham market rents of Southern's [40] construction of the warehouse facilities involved herein, it is apparent that the Commission did consider this argument. Commissioner Webb based his dissent upon it. (308 I.C.C. 640.) But we are of the opinion that under the teaching of Baltimore & Ohio R. Co., a railroad cannot justify its charging of lower rents because of the depressive effect upon pre-existing market rentals of its action in constructing facilities to be rented at a substantially lower rental.

Upon our review of the record in this case, we find that the Commission's conclusions and findings are supported

by substantial evidence. On the issues raised, even if we disagreed with the Commission, we would not be free to overturn its decision. Where an order of the Interstate Commerce Commission is attacked as being contrary to the evidence, the judicial function in this respect is exhausted when there is found to be a rational basis for the conclusions of the Commission. Mississippi Valley Barge Line Co. v. United States, 1934, 292 U.S. 282, 287, 54 S.Ct. 692, 78 L.Ed. 1260. The complaint admits that there was testimony to support the Commission's findings with respect to Birmingham rental practices although plaintiffs attack the credibility of such testimony. But it is the task of the Commission and not of the courts to pass upon the weight and credibility of the evidence. Moreover, there is a presumption that the Commission has properly performed its official duties and this presumption supports its acts in absence of clear evidence to the contrary. See, American Trucking Association v. United States, D.C.N.D. Ala., 1951, 101 F.Supp. 710, affirmed, 1953, 344 U.S. 298, 73 S.Ct. 307, 97 L.Ed. 337.

Plaintiffs insist that the Commission's requirement that the railroad include in the rental base the cost of spur tracks designed to service the individual facilities of the terminal is a taking of its property without due process of law. The record supports no such conclusion. Southern is not required to surrender the normal and usual control over such tracks; it is merely required to include their cost in the costs upon which rentals are based just as any other landlord would do if it provided such facilities.

Plaintiffs further contend that they were prejudiced by the participation of the Commission's Bureau of Inquiry and Compliance in the proceeding. The record discloses that the Bureau intervened pursuant to open petition without objection from plaintiffs. Such intervention was actually used by Southern to obviate the necessity of its

responding to a subpoena duces tecum through which it might well have been required to produce documentary evidence. Moreover, such interventions are a part of the general duties of the Bureau.[8]

As stated in its report, "The Commission is the guardian of the general public interest and proceedings before it are not in the nature of private litigation but matters of public concern in which the whole body of shippers and carriers is interested. Phillips Co. v. Grand Trunk W.Ry.Co., 236 U.S. 662 [35 S.Ct. 444, 59 L.Ed. 774]; United States v. Merchants & Mfrs. Traffic Asso. of Sacramento, 242 U.S. 178, 188; Jewelers [41] Protective Union v. Pennsylvania R.Co., 36 I.C.C. 71." (308 I.C.C. 613.) It is altogether proper that specially trained agency staff members participate in proceedings of general interest to shippers and carriers, such as that instituted by the Shaw Company complaint. Viewed from the standpoint of due process, it is preferable that such participation be open and public where the interested parties can meet the issues raised by it, rather than by internal administrative memoranda which interested parties have no opportunity to study or contradict. Such open participation by a clearly separate administrative arm of the agency such as that complained of here violates neither the letter nor the spirit of the Administrative Procedure Act. See Section

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[8] A description of the Bureau and the duties assigned it have been published pursuant to 40 U.S.C.A. Section 47 and 5 U.S.C.A. Section 2(a)(1), at 23 Federal Register 2654: *Bureau of Inquiry and Compliance*—Investigates violations, prosecutes in court and assists the Department of Justice in prosecuting civil and criminal proceedings arising under all parts of the Act (except violations of the safety acts which are under the jurisdiction of the Section of Railroad Safety, Bureau of Safety and Service), and related acts such as the Elkins Act, the Clayton Anti-Trust Act and the Transportation of Explosives Act. When specifically authorized by the Commission, or a division thereof in any particular case or class of cases, participates in Commission proceedings, for the purpose of developing facts and issues.

5(c). [5 U.S.C.A., § 1004(c).] The participation by the Bureau of which complaint is made here was in proper aid of the Commission's duty under Section 13(1) of the Interstate Commerce Act "to investigate the matters complained of in such manner and by such means as it shall deem proper."

We do not agree with plaintiffs that the Commission disqualified itself from acting on the Shaw Company complaint when it authorized the Department of Justice to file a civil action in this court seeking an injunction to prevent the consummation of the sale plan and to avert its continuing failure to collect rents. Civil Action No. 9155, United States v. Southern Railway Co. et al. That action resulted in an agreement by the railroad to maintain the *status quo* with respect to the sale plan pending a determination of the issue of its validity in the Commission proceeding.[7] Moreover, the Commission has a duty under Section 3 of the Elkins Act (49 U.S.C.A., § 43) whenever it has "reasonable ground for belief that any common carrier is committing any discrimination forbidden by law" to request the Department of Justice to institute such proceedings. That section provides that "the proceedings provided for by this Act shall not preclude" any other action provided by the Commerce Act.

Nor can the judgments entered in this court on the verdict of a jury against Shaw Company, Birmingham Ice,

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7. On August 28, 1958, Southern and Realty Company moved to dismiss the complaint of Shaw Company upon the filing of Civil Action 9155. The Commission overruled this motion by order dated October 29, 1958, stating "that the injunction proceeding filed in the United States District Court for the Northern District of Alabama (Southern Division) does not prejudice the issues in this proceeding, and that the said injunction proceeding is being held in abeyance pending a determination by the Commission of the issues in this proceeding". However, the Commission refused to rule on the validity of the sale plan because it considered that such action would be "manifestly premature." 308 I.C.C. at 616.

and Boggs Cold Storage Company, in their suits for damages be *res judicata* of the Commission order, as plaintiffs contend. Those judgments are now pending an appeal in the Court of Appeals for the Fifth Circuit, but regardless of the outcome of such appeals, the appropriate conditions for application of the doctrine of *res judicata* are not present. The parties are not even the same. The success or failure of private litigation cannot have the effect to bar or stay the power of the Commission to act in a public proceeding such as that before the Commission under the Shaw Company complaint. See Land v. Dollar, 330 U.S. 731 (1947). Furthermore, although such judgments were entered in June, 1959, over six months prior to the Commission's decision and order, no claim of *res judicata* was made before the Commission and none was included in plaintiff's petition for reconsideration filed in November, 1959. Since the issue was not presented to the agency it cannot properly be raised in this proceeding. United States v. L. A. Tucker Truck Lines, 344 U.S. 33 (1952).

[42] In support of their threshold contention that complainant warehouse had no standing before the Commission to challenge Southern's conduct, plaintiffs rely on the cases of Pittwood v. Northern Pacific R. Co., 51 I.C.C. 555 (1918), and Fireproof Storage Company v. Hines, 26 Fed. 215 (Wash. 1919). The holding in these cases was that the mere owner of property capable of being used as a warehouse on a railroad had no standing to complain of railroad rental practices affecting the value of his property. Neither case was appealed and the result reached in each of them may be inconsistent with the Supreme Court's apparent holding in Barringer v. United States, 319 U.S. 1, 13 (1943), that the protection of Section 3(1) of the Act extends to every person affected by violations of its prohibitions regardless of his relationship to transportation. However, we do not need to meet that question

since it appears that the Commission actually applied the doctrine of Pittwood and Fireproof Storage to warehouse operators in McCormick Warehouse Co. v. Pennsylvania R. Co., 95 I.C.C. 301 (1925), only to reverse its position on rehearing in the same case, 148 I.C.C. 299 (1928). The Commission there decided that warehouses are so closely connected with transportation that they are the actual shippers and receivers of freight for their customers, although the warehouses often neither own nor pay the cost of the freight, nor appear as parties to the bill of lading. As such they, like freight forwarders, have the status of shippers and receivers of freight under the Commerce Act. This holding was affirmed in Terminal Warehouse Co. of Baltimore v. United States, 31 F.2d 951, 957 (D.C. Md. 1929). This position has been sanctioned by the Supreme Court in such cases as Merchants Warehouse Co. v. United States, 283 U.S. 501 (1931), affirming 44 F.2d 379 (E.D. Pa. 1930), sustaining Gallagher v. Pennsylvania R. Co., 160 I.C.C. 563 (1929); Terminal Warehouse Company v Pennsylvania R. Co., 297 U.S. 500 (1936), affirming 78 F.2d 591 (C.C.A. 3, 1935), overruling 7 F.Supp. 484 (E.D. Pa., 1934). See also Propriety of Operating Practices—New York Warehousing, *supra*. Moreover, Section 13(1) of the Interstate Commerce Act appears to say that "any person" can file a complaint. This was interpreted in Merchants Warehouse Co. as follows:

> "The warehouse companies are 'persons' authorized to lodge a complaint with the Commission by § 13(1) of the Interstate Commerce Act, and they are 'persons' within the meaning of that word as used in §§ 2 and 3 of the Act."
>
> (283 U.S. at 512.)

Finally, plaintiffs complain that the order requiring them to base their rents on the prevailing market practice

in Birmingham in 1955, viz., 8 percent of land value and 10 percent of all costs except those which they are expressly authorized to exclude, is fatally vague. The claim of vagueness is based primarily on the fact that the exact amount of certain of these costs was not established before the Commission; only their existence and substantial nature were shown. However, the railroad obviously is in a position to establish the exact amount of these costs and the Commission's order properly places the onus on Southern to establish the full and true amount thereof by the filing of sworn affidavits setting out all such costs.

It follows that plaintiffs are not entitled to the relief for which they pray and that this action is due to be dismissed. An order of dismissal will be prepared and entered.

APPENDIX E.

ORDER ON PRETRIAL HEARING.

In the
UNITED STATES DISTRICT COURT
For the Northern District of Alabama,
Southern Division.

Civil Action.[a]

No. 9155.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, ET AL.,
Defendants.

Civil Action.[b]

No. 9080.

BIRMINGHAM FOOD TERMINAL, INC.,
a Corporation, et al.,
Plaintiffs,

vs.

SOUTHERN RAILWAY COMPANY ET AL.,
Defendants.

Civil Action.[c]

No. 9815.

SOUTHERN RAILWAY COMPANY and GEORGIA
INDUSTRIAL REALTY COMPANY,
Plaintiffs,

vs.

A. K. INVESTMENT CORPORATION ET AL.,
Defendants.

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[a] *An Elkins Act suit for an injunction to enforce collection of rents under Commission's order from August 1, 1957 to date.*

[b] *A suit for declaratory judgment.*

[c] *A suit to collect rents under Interstate Commerce Commission order for the period commencing September 1, 1960.*

The above cases coming on to be heard on a regular pretrial hearing and all parties being present in person or by counsel, the following action was thereupon taken.

1. For the convenience of the parties and in the interest of justice, these actions are consolidated for the purpose of trial and will be tried to the court, without the intervention of a jury, on Monday, April 23, 1962, at 10:00 a. m.

The statement of the contentions of the parties makes it unnecessary to describe the pleadings in these actions.

2. It was agreed by all of the parties that the following are all of the issues in controversy in these cases:

No. 9155.

Issues raised by the original complaint and the complaint in intervention:

Contending that each defendant tenant is a shipper or consignee of freight within the intendment and coverage of the Elkins Act and the Interstate Commerce Act, plaintiff insists that defendants Southern and Georgia Industrial are obliged to collect and defendant tenants are bound to pay rentals computed upon the cost base found by the Interstate Commerce Commission from August 1, 1957, including the obligation of defendant Jefferson Warehouse, as successor to Thomas N. Nelson and Birmingham Terminal for such rentals unpaid by and uncollected from its predecessors. Plaintiff further insists that no tenant should be allowed to purchase below such cost basis and that defendants Southern and Georgia Industrial should be prohibited from extending credit in any form in aid of such purchases.

In addition, the complaint in intervention prays for the assessment of treble damages under the Elkins Act for unpaid and uncollected rent.

Issues raised by defendant tenants except W. L. Smith, Jefferson Warehouse, Southern Bonded Warehouse and W. C. Hudlow, Jr.:

Each defendant insists that its connection with the shipment or receipt of freight is not such as to bring it within the coverage of the Elkins Act or the Interstate Commerce Act. Each defendant also contends that, without the aid of Southern's credit, it should be permitted to purchase its premises at present fair market value though less than the cost basis found by the Commission.

Issues raised by defendants Jefferson Warehouse and W. C. Hudlow, Jr.:

Defendant Jefferson Warehouse admits that it is covered by the acts; defendant Hudlow denies that he is. Defendant Jefferson Warehouse denies that it is a successor to Thomas N. Nelson or Birmingham Terminal in the sense that it is liable for rents unpaid by or uncollected from such companies. Each defendant insists that it would be inequitable to apply the Commission's cost formula for any period prior to the effective date of its order, September 1, 1960; that its rentals should be reexamined in the light of all circumstances which have intervened between the hearings conducted by the Commission and the present, and that neither is bound by the Commission's order establishing a rental formula or the schedule of rentals filed by Southern pursuant to such order.

All defendants join in the foregoing contentions relevant to them. These defendants adopt the contentions of other defendants tenants with respect to the right to purchase premises.

Issues raised by defendant W. L. Smith:

Defendant denies that it is covered by either act and contends that it is not interested in purchasing property. Defendant further insists that any rental it agreed to pay should be reduced because the premises actually constructed for it were substantially less than those which Southern had agreed to construct. Such defendant also contends that it vacated the premises concerned prior to the effective date of the Commission order and further, adopts the contentions of other defendants relevant to it.

Issues raised by defendant Southern Bonded:

Such defendant denies that it is covered by the acts and that it is interested in any purchase. It insists that it no longer is a tenant of the premises concerned and contends that it has paid in full all rent required by the Commission formula since September 1, 1960. In addition, it adopts all contentions of other defendants relevant to it.

Defendants Southern and Georgia Industrial tender the following issues:

Defendants have attempted to comply with the September 1, 1960, order of the Commission. In doing so they neither claim nor concede that such order was correct but recognize that such order imposes a legal obligation to comply therewith with respect to tenants subject to such order. They explicitly contend that the so-called round-robin contract with the tenants was violative of no law.

Denying the invalidity of the original purchase agreement, defendants nevertheless insist that since there are no other outstanding proposals to purchase or sell, any issue relating thereto is now moot.

Nos. 9080 and 9815.

All legal issues, except those relating to the counterclaim filed by defendants in No. 9815 on January 12, 1962, are embraced within the order on pretrial hearing entered in No. 9155.

Since the counterclaim is not at issue, a further pretrial hearing of limited scope may be held on notice.

It is, therefore, Ordered by the court that all of the above-named allowances and agreements be and the same are hereby binding upon all parties in the above-styled cases, unless this order be hereafter modified by order of the court.

Done, this the 15th day of January, 1962.

Seybourn H. Lynne,
Judge.

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FILED
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 4[redacted]747

SHAW WAREHOUSE COMPANY, BIRMINGHAM ICE AND COLD STORAGE COMPANY, and BOGGS COLD STORAGE COMPANY,
Petitioners,

vs.

SOUTHERN RAILWAY COMPANY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF.

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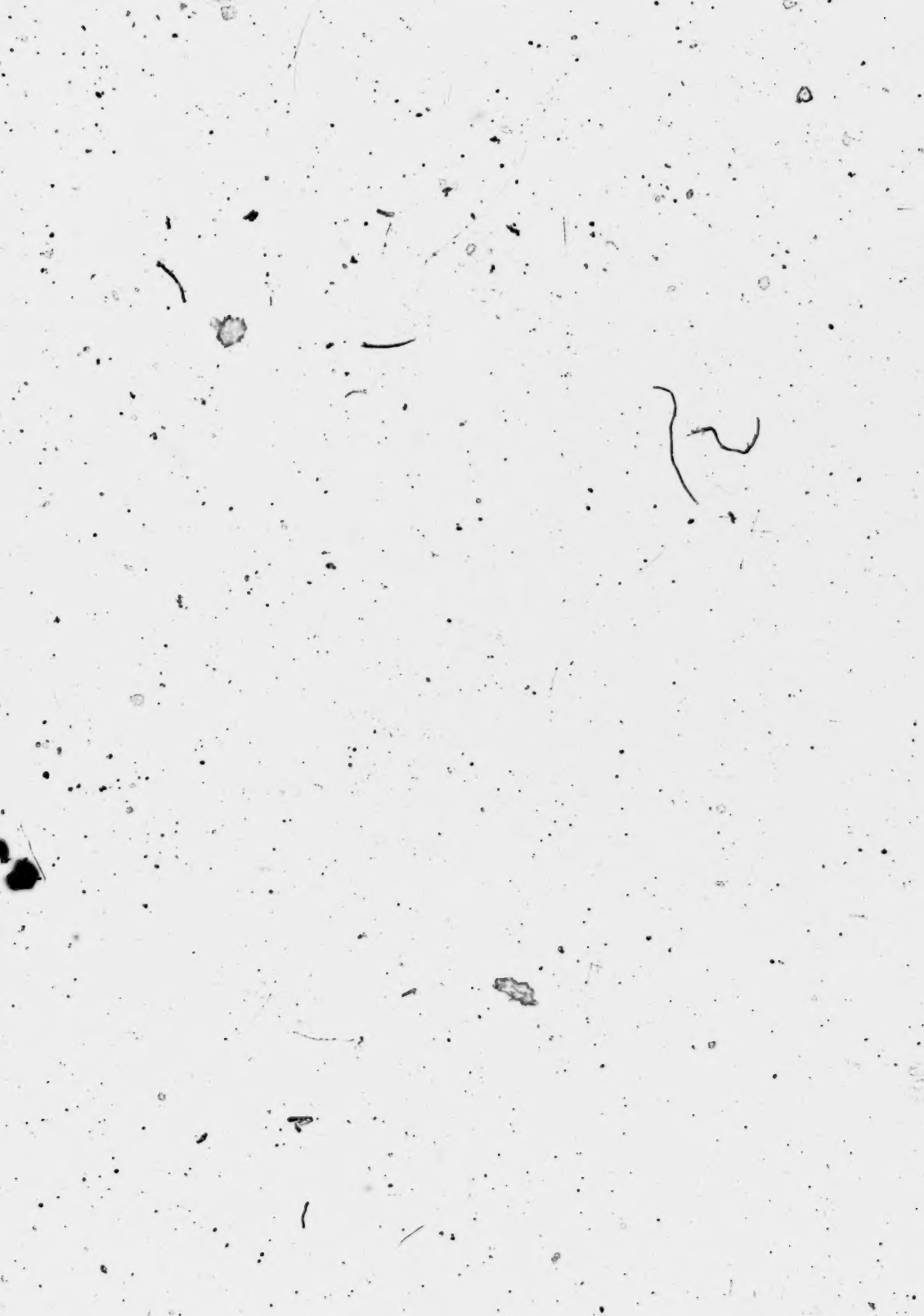

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 447.

SHAW WAREHOUSE COMPANY, BIRMINGHAM ICE AND COLD STORAGE COMPANY, and BOGGS COLD STORAGE COMPANY,
Petitioners,

vs.

SOUTHERN RAILWAY COMPANY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF.

Respondents' brief in opposition to certiorari accepts Petitioners' statement of the case. It neither significantly supports the opinion below nor really challenges the merits of either the petition or the dissent of Judge Brown. In the main it attempts to oppose by confession and avoidance.

However, the serious problems pointed out by Judge Brown's dissent, concerning the Court's prior decisions

on primary jurisdiction and the permitting of an indirect collateral attack on a final administrative decision, cannot be avoided by out of context, and outside the record, quotations of a small part of an argument before the trial court. Nor can the questions presented be avoided by unexplained assertions that none of the questions presented are really involved in this case, or, that the petition only challenges evidentiary findings under undisputed principles of law.

Neither the petition nor the dissent require any review of record. The legal issues which Respondents argue "are not involved" were, in fact, at the core of both the jury charge and the opinion below as the petition specifically demonstrates, and as the dissent repeatedly emphasizes. The courts below establish rules which, for the first time, permit railroads to subsidize shippers from freight revenues by extending credit in the rental or sale of facilities. The petition demonstrates that prior decisions of other Circuit Courts of Appeal, the Interstate Commerce Commission, and the Three-Judge Court say the opposite. Two opposing rules of law have been applied to identical contracts and practices. As Judge Brown exclaims, "Only one is right. Both may not be the law simultaneously." 294 F. 2d at 855 (Appendix at 53).

Respondents even ask the Court to assume that the jury ignored the obviously erroneous charge authorizing the exclusion from rents of depreciation (the recovery of construction costs). But under Anglo-American jurisprudence, as Judge Brown points out, "The law . . . must assume the erroneous charge induced the verdict." 294 F. 2d at 855 (Appendix at 53).

The most serious statement made by Respondents, and the statement that induced this reply, was the unexpected representation to the Court that the depreciation exclu-

sion charge was requested by the plaintiffs below (p. 7).[1] **This is not true.** Petitioners' requested charge expressly included depreciation as an element to be recovered in rents (R. 806):

> "When new facilities are constructed by a railroad and rented to tenants whose business includes the shipment or receipt of rail freight as owners or as consignees or consignors the total rental charged must not be less than an amount which will fully cover a fair return on that plus taxes, insurance, **depreciation** and maintenance and no such new construction should be undertaken unless there is assurance with all reasonable certainty that such rentals can and will be collected." (Emphasis supplied.)

The trial court modified this requested charge by a parenthetical supplementary oral comment as is clearly shown by the record:

> (And that's to be taken in connection with my previous instruction to you that if it is intended that the purchase plan be carried out you would strike from that the factor of depreciation in computing a compensatory rental.)

Respondents would have the Court believe that the trial court's comment was a part of Petitioners' requested written charge.

This comment, and its exclusion theory, was repeatedly and vigorously excepted to by Petitioners (R. 807, 808, 815-816, 819, 827, 828). This comment was the basis of

---

[1] Southern expert J. J. F. Steiner excluded depreciation from his rental appraisal at the direction of Respondents' counsel (R. 689-690, 719-720). He said that his rental value appraisal was the most unique he had ever made—that the "extraordinariness and uniqueness is that I was asked to make an appraisal with no consideration for the recovery of depreciation" (R. 736, see R. 734-735).

ground 52 of Petitioners' motion for new trial (R. 861-864). And even when the jury specifically asked for the additional instructions on the "compensatory part" of the charge, the trial court would not even modify the charge to at least require financial ability of tenants such as Nelson Company to support a purchase intention to which the charge would assign such legal consequences (R. 820, 823-825). Respondents cannot now rewrite the record to support their argument.

Petitioners respectfully submit that for the reasons set out in their petition, a writ of certiorari should be granted as prayed.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 747.

SHAW WAREHOUSE COMPANY, BIRMINGHAM ICE AND COLD STORAGE COMPANY and BOGGS COLD STORAGE COMPANY,
Petitioners,

vs.

SOUTHERN RAILWAY COMPANY, THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY and GEORGIA INDUSTRIAL REALTY COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

For Respondents in Opposition to Petition for Certiorari.

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SOUTHERN RAILWAY COMPANY, THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY
and
GEORGIA INDUSTRIAL REALTY COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

For Respondents in Opposition to Petition for Certiorari.

Respondents, Southern Railway Company, The Alabama Great Southern Railroad Company and Georgia Industrial Realty Company, respectfully submit that the petition for writ of certiorari should be denied.

SUMMARY STATEMENT OF REASONS FOR DENIAL OF THE WRIT.

The petition should be denied for the reason that it involves no questions of importance under the Interstate Commerce Act or other issues deserving the attention of this Court but is merely an attempt to have the Court review the weight of the evidence in a voluminous record of a jury trial in three damage suits which resulted in verdicts and judgments against the petitioners, plaintiffs in the actions. The District Court overruled motions for judgment notwithstanding the verdict and for new trial, and the judgment was affirmed by the Fifth Circuit, 288 F. 2d 759, and reaffirmed on petition for rehearing, 294 F. 2d 850.

A review by this Court would merely involve review of the determinations of fact underlying the verdict and the affirmance below, and it is well settled that certiorari is not to be granted merely to review the evidence or inferences drawn from it.

PETITIONERS' STATEMENT OF "QUESTIONS INVOLVED" IS INCORRECT.

The petition (pp. 2-3) presents as "questions involved" several propositions of law which are in no way issues in these cases.

1. a. and 1. c. No question is involved as to whether or not a railroad can "lease non-transportation facilities to shippers at rents which are less than compensatory and less than prevailing market rents for such facilities" or "furnish working capital to shippers by permitting them to occupy railroad-owned facilities for extended periods of time without paying compensatory rents at least equal to prevailing market rents." On the contrary, the Dis-

trict Judge, at the petitioners' request, charged the jury that a railroad can do neither legally, and the jury found for the defendants.

1 b. Nor is there any question directly involved as to whether a railroad can "guarantee shipper obligations" for the purchase of warehouse property from the railroad. This question of law was indirectly raised below as bearing upon an alternative justification of the level of rents charged by the railroad. Furthermore, it is submitted that there can be no substantial argument against the right of a railroad to guarantee purchase obligations of potential shippers for the purpose of controlling the use of the property.

2. Finally, there is no substantial question involved here as to the "binding" effect of a decision of the Interstate Commerce Commission, rendered after the trial and verdict in this case, in a wholly independent proceeding.

The only question involved in these cases is whether or not the evidence is sufficient to support the jury verdicts, certainly no basis for review by this Court.

ARGUMENT.

A.

The basic provision of the Interstate Commerce Act on which the petitioners' entire case is rested, both below and in this Court, is the prohibition against discrimination by carriers in furnishing transportation facilities, 49 U. S. C. § 6 (7). Although petitioners make a long and involved tale of the matter, the factual issues involved were really fairly simple and were resolved against petitioners by the jury and the courts below. Petitioners as warehousemen complained that the provisions of leases by the respondent Southern Railway Company of warehouses constructed by it on its property to competitors of petitioners constituted unlawful discrimination. Petitioners also claimed that the railroad did not fulfill its statutory obligation with respect to timely collection of rents from the tenants.

The respondents took the position below, and still insist, that the case should never have been submitted to the jury because, as a matter of law, petitioners failed to prove any discrimination in relation to transportation. Both courts below decided against respondents and in favor of petitioners on this issue—the pre-eminent question of law both in the trial court and on appeal—and resolved whatever doubts they had in the matter in favor of petitioners by giving them an unprecedented standing to maintain an action for damages under the circumstances presented by this record. As the Court of Appeals pointed out, in all the 75 years since the enactment of the Interstate Commerce Act:

> "Pittwood v. Northern Pacific Ry. Co., 1918, 51 I. C. C. 535, is the only decision passing on the validity

> of a warehouseman's claim for damages against a railroad for an injury allegedly caused by an unjust discrimination." (288 F. 2d at 767, Petitioners' Appendix, p. 18.)

The *Pittwood* case held that there was no right of action by the warehouse owner. The trial court held, however, as a matter of law, that the petitioners, as operators of competing warehouses, did have a right to maintain such an action, and the cases were submitted to the jury on that basis. The Court of Appeals chose, on this question, "to err, if it be error" (288 F. 2d at 771, Petitioners' Appendix, p. 27) in favor of the petitioners, and on rehearing, held the question to be "essentially a factual one or a mixed question of fact and law" but stated that "appellants have no cause for complaint," since the issue was not submitted to the jury (294 F. 2d at 853, Petitioners' Appendix, p. 49).

Thus the courts below did not hold as a matter of law, as petitioners assert in their first "question involved," that a railroad could "lease non-transportation facilities to shippers at rents which are less than compensatory and less than prevailing market rates for such facilities." On the contrary, as the court below pointed out (288 F. 2d at 762, Petitioners' Appendix, p. 7), this was the very proposition of law on which it was submitted to the jury by the District Court on Petitioners' theory:

> "Was the rent charged to the tenants of the Birmingham Food Terminal a fair rental, in view of all the circumstances, a fair market rental, or was it less than the fair market rental, or was it less than a compensatory rental?
>
> "If you decide that it was a fair market rental and that it was a compensatory rental, then there would be a second question because the plaintiff is saying

in each case that if it is conceded that the rental was a fair market rental or a compensatory rental, the railroad was guilty of unlawfully extending its credit to the tenants by failing to use due diligence in collecting the rent."

B.

Nor is the petitioners' second question under the Interstate Commerce Act, namely, whether a railroad can "guarantee shipper obligations in order to enable the shippers to obtain long term financing . . ." (Petition, p. 3) really involved in this case. In the first place, such an arrangement in connection with a sale of railroad property is perfectly legal, and no authorities are cited to the contrary. Secondly, even if the argument had any validity, that so-called issue is involved only indirectly and remotely, since the contingent undertaking by the respondents to assist in the financing by shippers of the construction or purchase of warehouses through the guarantees of second mortgages never was carried out. As a commitment for the future only, it was held by the courts below to be a proper element for consideration, in the alternative, by the jury in determining the rent level as affected by the element of depreciation (288 F. 2d at 773, Petitioners' Appendix, p. 32).

Furthermore, the statement in the petition (p. 9) that the three-judge court, in sustaining the Commission order, held the *original sales plan illegal* is not correct. That court said only that on the record before it the Commission could find that the *rent* plan (formula omitting depreciation) was "the equivalent of an agreement by the railroad to postpone part of the rent to a future date, resulting in an unlawful loan or extension of credit . . ." (186 F. Supp. at 38, Petitioners' Appendix, p. 76).

Contrary to the petitioners' assertion, the court noted, "However, the Commission refused to rule on the validity of the sale plan because it considered that such action would be 'manifestly premature,' 308 I.C.C. at 616" (186 F. Supp. at 41, n. 7, Petitioners' Appendix, p. 82).

C.

There is no inconsistency whatever between the decisions and judgment below and the so-called "credit extension cases" (Petition, p. 11). Much is sought to be made of the argument that depreciation "costs" were excluded from rent. This argument was rejected by the jury, and by both courts below, for several good reasons. So far as this Court is concerned, it is sufficient that there was evidence from which the jury could find that the basis of the rent charged was adequate to include depreciation and still constitute compensatory rent and not less than fair market rent.[1] The charge on the level of rent as given to the jury was, as the Court of Appeals pointed out, in terms requested by petitioners, and required a finding that the rent would constitute a "fair return" (288 F. 2d at 773, Petitioners' Appendix, pp. 32-33). The Court of Appeals held there was substantial evidence to support the verdict.

The addition by the District Court to the charge as requested by plaintiffs, to the effect that depreciation might properly be eliminated if the jury found that the parties intended to carry out the original purchase plan, was sound but was not essential to the verdict, as it merely gave an

[1] The Court of Appeals said as to this:

"This Court must assume that if the jury found it necessary to consider depreciation, it found that the rents were not only at the market value but yielded a 'compensatory return.'" (288 F. 2d at 772, Petitioners' Appendix, p. 30)

alternative basis for the verdict on this aspect. There was ample evidence to support a finding by the jury that, even including depreciation, the rent level was adequate.

D.

Nor did the court below hold (and respondents did not then and do not now contend) that there is any right on the part of the railroad to "furnish working capital to shippers by permitting them to occupy railroad-owned facilities for extended periods of time without paying compensatory rents at least equal to prevailing market rents" (Petition, p. 3).

However, it cannot seriously be contended that a railroad is under an absolute obligation to collect all rents on all facilities furnished without regard to circumstances, and no court or commission has ever so held, although that appears to be the position now asserted by petitioners (Petition, pp. 17-19).

As the court below said on the issue, construing Section 3 (1) of the Interstate Commerce Act (49 U. S. C. § 3 (1)):

> "The statutory test, however, is one of reasonableness. The Act condemns 'undue or unreasonable' concessions.
>
> "In view of the language of the statute prohibiting *undue* concessions, the charge properly instructed the jury to consider whether the defendants exercised *due* diligence in collecting the rent. Appellants do not suggest, here or in their requested charges, that the law imposed a higher degree of duty on the carrier" (288 F. 2d at 774, Petitioners' Appendix, pp. 33-35).

E.

Nor is the additional and contingent "question presented" advanced in footnote 4 on p. 10 of the petition a correct statement of any issue or possible issue in the case. It is clear that the District Judge fairly and clearly instructed the jury in the trial which had been set, first on the issue of liability only, without objection by plaintiffs, that the plaintiffs' only burden of proof as to damages at that stage was that they had sustained *some* injury which was capable of evaluation in money.

The charge was favorable to plaintiffs and indeed relieved them of what defendants believe to be a burden of proof as to causation and damages which plaintiffs could not have met.

F.

Thus, the petition merely seeks to have this Court review the record already thoroughly canvassed by the two courts below and overturn the jury's findings of fact on issues submitted basically on the petitioners' theory of the law. This is clearly indicated by petitioners' labored and argumentative footnoting of the opinions of the court below. (See Petitioners' Appendix.)

All the so-called "questions involved" under the Interstate Commerce Act are merely attempts to have this Court review the record of the jury trial, not from the standpoint of the propriety of the trial court's instructions, which were substantially favorable to petitioners, but as to the sufficiency of the evidence to support the verdict. All aspects of the trial have been thoroughly reviewed by the two courts below and properly disposed of by them. Certiorari should not now be granted merely to

review the evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 178 (1938).

G.

The petitioners, having filed and vigorously pressed these cases to trial while a related proceeding filed by them in the Interstate Commerce Commission was pending and having lost in the trial court, argued for the first time in the Court of Appeals, and now argue here that these cases should be reversed solely because of an allegedly inconsistent Commission decision, rendered after the trial and judgment in the District Court, on the ground that "conflicts with primary jurisdiction cases" are involved.

These are not proper cases for the application of the doctrine of primary jurisdiction, and even if they were, the petitioners have waived their contention that the primary jurisdiction doctrine is applicable and are now estopped to raise that contention in this Court.

Petitioners insisted in the District Court that the fact questions in these damage suits, the only issues involved, are plainly not the type that call for exercise of the expertise of the Interstate Commerce Commission, and that, indeed they are questions which a court and jury in Birmingham, Alabama, are particularly well qualified to determine, i. e., fair rental value in Birmingham and the reasonableness or due diligence of the railroad in collecting rent in the light of all the circumstances. As petitioner Birmingham Ice and Cold Storage Company said in its brief in the trial court on motion to dismiss, (p. 16),

> "The interpretation of the contracts and agreements incidental to the factual determination of what the dealing of the parties have been are determinations

as to which this Court is eminently experienced to make."

Furthermore, these cases do not present a situation which in any respect calls for uniformity of interpretation and enforcement by the Commission. Certainly the fair market value of a parcel of rental real estate, and the due diligence exercised by a railroad in the collection of rents in a particular situation will depend altogether on the facts of the case and cannot establish criteria for other fact situations. This case is wholly dissimilar from the familiar reasonable rate cases such as *A. B. Phillips Co. v. Grand Trunk W. Ry.*, 236 U. S. 662 (1915) and *National Pole Co. v. Chicago & N. W. Ry.*, 211 Fed. 65 (7th Cir. 1914), cited in the petition (p. 20). *Mitchell Coal & Coke Co. v. Pennsylvania RR.*, 230 U. S. 247 (1913), and *United States v. Western Pac. RR.*, 352 U. S. 59 (1956), also cited by petitioners (petition, p. 20), both involved the interpretation of highly technical tariff provisions, obviously matters requiring the exercise of Commission expertise and uniformity of interpretation and application.

Although we firmly deny that the doctrine of primary jurisdiction has any application to these cases, we submit that, even accepting the applicability of that doctrine for the purpose of argument, the petitioners have long since waived any right to raise this question and are now estopped to do so. In July 1957 petitioner Shaw Warehouse Company filed a complaint with the Interstate Commerce Commission, requesting orders prohibiting the respondents Southern Railway Company and Georgia Industrial Realty Company from alleged discriminatory practices. In January 1958 petitioner Birmingham Ice and Cold Storage Company intervened in the Commission proceeding, and in February 1958 petitioner Boggs Cold Storage Company intervened. Although reparations could have been sought in the Commission proceeding under

Section 9 of the Interstate Commerce Act, 49 U. S. C. § 9, none of the three petitioners asked for reparations. Shaw Warehouse Company did state in its original complaint that it was filed pursuant to Section 9, but this was deleted by an amended complaint.

In March 1958 Shaw Warehouse Company and Birmingham Ice and Cold Storage Company filed their suits here on appeal, and Boggs Cold Storage Company filed its suit in June 1958. The defendants (respondents here) promptly moved to dismiss the cases below, or in the alternative for a stay of trial, on the ground, among others, of the pendency of the Commission proceeding. The petitioners objected to either dismissal or stay, insisting that they had the clear right of election under Section 9 of the Interstate Commerce Act to seek damages in the courts, independently of the Commission proceedings.[2]

In the reply brief of petitioner Birmingham Ice and Cold Storage Company in the trial court on motion to dismiss (which brief was joined in and adopted by petitioner Shaw Warehouse Company), it was stated that:

> "This case presents only non-transportation problems which certainly could be decided by the Commission, but as to which decision by the Commission

[2] In their Appendix (p. 2) the petitioners omitted the parts of Section 9 which provide for an election of remedies. The first sentence of that section, *in full*, reads as follows:

> "That any person or persons claiming to be damaged by any common carrier subject to the provision of this part *may either make complaint to the Commission as hereinafter provided for*, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any district or circuit court of the United States of competent jurisdiction; *but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.*" (Emphasis supplied to indicate omitted parts.)

is not essential. These problems are confined to the interpretation of contracts and the determination of values of local real estate. On these issues the plaintiff submits that the 'expertise' of this court, if not superior, is at least equal to that of the Commission" (Brief, p. 3).

"Can it be said that the administrative agency is peculiarly able to determine the questions here? The plaintiff repeats the resounding 'No' of its original memorandum. The private contracts and agreements of the defendants are indeed peculiarly suited for interpretation by this Court as the defendants themselves have admitted in Action Nos. 8966 and 9080 in which they have themselves asked this Court to interpret those very agreements. Whether those agreements provide for the sale and rental of real estate in Birmingham, Alabama, at less than cost and on less than fair market terms is an issue which is indeed more peculiarly suited for a court in the area where the real estate is situated than any other body, administrative or judicial, anywhere" (id., p. 8).

"The issue defendants raise by inference without arguing it precisely is that of concurrent jurisdiction. Plaintiff freely admits that this claim for damages could be submitted by it to the Commission without jury trial. But it prefers a trial in this Court and is clearly entitled to it.

"Likewise, the plaintiff is entitled to ask the Commission for protection in the future from a continuation of the defendant's unlawful conduct.

"The situation is not unlike that which commonly arises where an injured party is entitled to several

different types of relief available to him in different forms. An employer may be entitled to a cease and desist order from the National Labor Relations Board and to damages from a court of law because of a union's course of conduct as pointed out by Mr. Jaffe in the article cited by defendants. (See 102 U. Pa. L. Rev. 578.) If both remedies are sought should the situation be any different from that in which only damages are sought? See *Pennsylvania R. Co. v. International Coal Min. Co.*, supra" (id., pp. 10-11).

"Here the parties are not the same: in fact, the Bureau of Inquiry and Compliance of the Commission is a party by intervention in the *Shaw* proceeding. The rights asserted and the objects are not the same; in the *Shaw* proceeding injunctive type relief is sought; in this action damages are the object of relief.

"In this light, we earnestly submit that the matters raised by defendants are for the discretion of the Court. . . . The defendants have not shown just reason for the exceptional procedure they impliedly ask and the Court should therefore allow the case to take its normal course in proceeding to trial" (id., p. 12).

The motions to dismiss or, in the alternative, to stay were overruled at the insistence of petitioners. In July 1958 the examiner's report in the Commission proceeding was handed down, and, even though it favored on some propositions the position taken in the proceeding by these petitioners, they, apparently fearing that the Commission might not accept the examiner's report, continued to press for the trial of their damage suits. The damage suits were tried in May 1959, resulting in judgments against the plaintiffs, and appeals to the Court of Appeals were filed in August 1959. In October 1959 the Commission report

came down, but even then the plaintiffs were afraid to rely on it. Although they went so far as to attach a copy of the entire report of the Commission as an exhibit to their brief in the Court of Appeals and to attempt to use the findings of fact in that decision to supply the deficiencies in the record in the damage suits, they did not argue that the Commission's decision should be controlling. They simply suggested weakly that the decision "should be given special weight" and that "it is entitled to great weight in the decision and treatment of the issue involved." They did not state whether or not this "great weight" was to be given to the decision as to law or to fact, or to both. The Court of Appeals in the opinion on rehearing (294 F. 2d at 852, Petitioners' Appendix, p. 47) acknowledged that the opinion of the Commission and that of the three-judge court had been given "great weight" in the consideration of the appeals.

Even in their petition for rehearing in the Court of Appeals, which was after the time had expired for appeal of the decision of the three-judge court and there was no longer any question that the decision of the Commission was final, the petitioners hesitated to raise the question of primary jurisdiction. In that petition they simply said that: "deference to the Commission's determination is necessary." The first mention of "primary jurisdiction" on these appeals was by Judge Brown in his dissent in the opinion on rehearing (294 F. 2d at 858, Petitioners' Appendix, p. 60).

It should be noted that Judge Lynne, who tried these cases, spoke for the three-judge court (which also included Court of Appeals Judges Tuttle and Rives) and found no inconsistency between the Commission's decision and order and the validity and judgment in these cases. Nor did Judges Hutcheson and Wisdom of the Court of Appeals find any such inconsistency. The petitioners' petition for

rehearing "in banc" in the Court of Appeals, addressed to "all the active Circuit Judges," was denied.

In view of the petitioners' successful insistence throughout the District Court stages of these cases that it should proceed without regard to the pendency of the Commission proceeding, even if there were otherwise any merit in the contention that the Commission decision rather than the prior verdicts and judgments in the District Court should be the controlling judgment (which on its face seems to be the reverse of a fair and proper rule), petitioners are now estopped to assert any such position. There is no necessary inconsistency between the decision of the Commission and the judgments below, as the Court of Appeals and the three-judge court held. The issues and relief sought in the two proceedings were not the same, the parties were not the same, the witnesses and evidence were different. Even if there were necessary inconsistency, the situation is of petitioners' own making, and we do not believe that judicial process should be made a tool in any such game of cat and mouse.

II.

Finally the petitioners made the farfetched suggestion that the decision of the Court of Appeals "will convert every effort of an injured party to enforce his clear statutory right under Sections 8 and 9 into an opportunity for the offending railroad to mount an otherwise unavailable collateral attack on the Interstate Commerce Commission decisions" (Petition, p. 22). Just how this will result is difficult to comprehend. The railroad in this case has mounted no attacks; the attacks have been mounted by the petitioners. They chose to divide their forces and to attack from two directions, through the Commission and through the courts, although they could have con-

centrated their efforts in the Commission alone, seeking there both injunctive relief and damages, 49 U. S. C., § 9. The fact that one of their attacks has failed, even though the other has succeeded in part, does not constitute a "collateral attack" on the Commission order.[1] That there is no legal inconsistency in two fact-finding bodies' reaching differing conclusions on different records in the determination of different issues is well stated in *United Brick & Clay Workers v. Deena Artware, Inc.*, 198 F. 2d 637, 642-3 (6th Cir.); *cert. denied*, 344 U. S. 897 (1952); *reh. denied*, 344 U. S. 919 (1953), where the court said:

> "We recognize that this finding is contrary to the finding in the companion case of N. L. R. B. v. Deena Artware, Inc., . . . [198 F. 2d 645 (6th Cir. 1952)] in which the Trial Examiner found that the picketing of the area of construction which caused the cessation of work by the general contractors was on the part of the Teamster's Union and not by the Appellants, which finding we have upheld and on which we have based a ruling in that case. Under our existing system of courts, juries, administrative agencies, and appellate review, such findings, even though inconsistent, are not invalid, and one does not destroy the other. The two proceedings, even though arising out of the same labor dispute, were heard by separate fact finding agencies. The witnesses in the two proceedings were not the same. The cross-examination of some witnesses who testified in both proceedings was not by the same attorneys. Necessarily, the evidence produced in the different proceedings by such

[1] The Commission decision in fact was favorable to respondents on the questions of fair market value of land, demolition cost of buildings on the land prior to construction of the new terminal facilities and other fact issues, but respondents were, at petitioners' insistence, forced to retry these issues to the jury and risk a contrary unfavorable jury determination.

testimony was not identical. Each fact finding agency was entitled to make its own decision upon the evidence before it. Though this Court on review recognizes the inconsistency, and may not be in accord with one of the two rulings if it was making the ruling as a matter of original jurisdiction, it does not have the right to set aside such ruling, . . . a case of the jury verdict, if it is supported by substantial evidence, or, in the case of the Labor Board proceeding, if it is supported by substantial evidence on the record considered as a whole. In our opinion, the respective findings are so supported in each of the two proceedings."

CONCLUSION.

Petitioners began this series of attacks against the competition at the Birmingham Food Terminal in July 1957. The Commission, on petitioners' complaint and after hearings and arguments extended over a period of about three years, entered orders fixing a floor on the rents which the respondents are obliged to charge and requiring them to collect these rents. The United States has filed suit to enforce collection of the rents; as have respondents, and the tenants in turn have sought declaratory judgment as to their obligations. The petitioners, Shaw Warehouse Company and Birmingham Ice and Cold Storage Company, have intervened in the suit filed by the United States. All these actions have been consolidated and are set for trial before Judge Lynne in April 1962 (Petitioners' Appendix, p. 86). Having sat on the three-judge court, and having tried the cases below, Judge Lynne is perfectly able to resolve any possible ambiguities and unsettled questions in the public interest. The damage suits here sought to be reviewed were tried exhaustively in 1959 and considered by the Court of Appeals originally and on rehearing for

more than a year. This Court is now asked to review the evidence and reverse and revive these damage suits. We submit that there is no longer any live issue in these cases and the petition should be denied.

Respectfully submitted,

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Certificate of Service

I, Jos. F. Johnston, one of the attorneys for Southern Railway Company, The Alabama Great Southern Railroad Company and Georgia Industrial Realty Company, respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of March, 1962, I served copies of the foregoing brief for respondents in opposition to petition for certiorari on the petitioners, Shaw Warehouse Company and Boggs Cold Storage Company, by mailing copies in duly addressed

envelopes, with first-class postage prepaid (first-class air mail postage prepaid in the case of Mr. Layne) to the attorneys of record for such petitioners as follows:

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I further certify that on the ..... day of March, 1962, I served copies of the foregoing brief of respondents in opposition to petition for certiorari on the petitioner, Birmingham Ice and Cold Storage Company, by mailing copies in a duly addressed envelope, with first-class postage prepaid, to the attorneys of record for such petitioner as follows:

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